15-382
Revised - Judge Davis -
Story & write

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~405~~ 430

THE ERIE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

FILED DECEMBER 14, 1870.

Dec. 2, 1873

SUPREME COURT OF THE UNITED STATES.

No. 405.

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IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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1 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States hereunto annexed, as follows, to wit:

2 *Specifications of objections to the settlement of the auditor general and State treasurer of the State of Pennsylvania, against The Erie Railway Company, for tax on tonnage.*

In the matter of the account settled by the auditor general and State treasurer of the Commonwealth of Pennsylvania, on the 12th day of July, 1866, between the Commonwealth of Pennsylvania and The Erie Railway Company, for taxes claimed to be due to the said Commonwealth, for the quarters ending September 30th, 1864, December 31st, 1864, March 31st, 1865, June 30th, 1865, September 30th, 1865, and December 31st 1865, under the provisions of the act of the general assembly of the Commonwealth of Pennsylvania, approved August 25th, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth."

The said The Erie Railway Company appeals from the said settlement, a copy of which is hereto annexed, to the court of common pleas of Dauphin County Pennsylvania, and specifies the following objections to the said settlement;

First. The said act of August 25th, 1864, imposes a tax upon
3 the whole tonnage passing over the railway of the said company, without discriminating between freight transported through Pennsylvania in transit from a foreign country or another State and freight in transit between points of receipt and delivery, of which one is beyond the limits of Pennsylvania, as one class, and freight in transit between points of receipt and delivery both in Pennsylvania, as another class. And in thus taxing the freight mentioned in the first class, i. e., that in transit from a foreign country or another State, and that in transit between points of receipt and delivery, of which one is beyond the limits of Pennsylvania, the said tax is repugnant to the the third paragraph of the eighth section of the first article of the Constitution of the United States, which gives to Congress of the United States the power to regulate commerce with foreign nations and among the several States, and with the second paragraph of the tenth section of the first article of the Constitution of the United States, which provides that no State shall, without the consent of Congress, lay
4 any imposts or duties on imports or exports, except what may be necessary for executing its inspection laws, and it is for these and other reasons unconstitutional and void,

Second. By the said settlement the Erie Railway Company is charged under the said act of August 25th, 1864, with a tax of three cents per ton on 15,800 tons of "hewn timber, animal food, including live-stock, also vegetable and other agricultural products, the value of which has not been increased by labor," and with a tax of five cents per ton on 117,200 tons of "all other articles not embraced in the preceding classes," in all a tax of six thousand three hundred and thirty-four dollars on one hundred and twenty-three thousand tons, of 2,000 pounds each, of freight transported to or from points, one of which is not within the State of Pennsylvania, over the railway of said company; which company is a corporation created under the laws of the State of New York, and owns and operates a railway extending from Jersey City, in
5 the State of New Jersey, and Piermont, in the State of New York, to Dunkirk, in the State of New York, portions of which road lie

in the counties of Susquehanna and Pike, in Pennsylvania, which said tax of six thousand three hundred and thirty-four dollars, thus charged as aforesaid, is in violation of the provisions of the Constitution of the United States above-cited, and the act imposing the same is unconstitutional and void.

Third. The said act of August 25th, 1864, is unconstitutional and void to the extent that it imposes a tax upon freight other than that both received and delivered within the State of Pennsylvania.

And the said company have caused the foregoing appeal and exceptions to be signed on their behalf by their president, and their corporate seal to be hereto affixed, attested by their secretary, this 4th day of April, 1866

{ SEAL OF THE ERIE RAILWAY COMPANY. } THE ERIE RAILWAY COMPANY,
By ROBERT H. BERDELL,
President.

HORATIO N. OTIS, *Sec'y.*

6 (Endorsement on specifications:) Commonwealth of Penn'a vs. The Erie Railway Company. No. 87, November term, 1866. Specifications of objections and copy of settlement. Filed Sept. 12, 1866. Received at the office of the auditor general Sept. 11, 1866, and entered.

7 *Copy of settlement appealed from.*

Erie Railway Company, in account with the Commonwealth of Pennsylvania, Dr.

For tax on tonnage, per act of August 25, 1864, for the several quarters ending Sept. 30th & Dec. 31st, 1864: M'ch 31st, June 30th, Sep. 30th & Dec. 31st, 1865, as per reports herewith filed:		
Due Commonwealth on settlement Sep. 2, 1864		$5,565 60
Verdict against the company in the case of Com'lth vs. Erie Railway Company	$761 00	
Interest on above	45 18	
		806 18
Second class:		
Quarter ending Sept. 30, 1864	2,118 tons	
Quarter " Dec. 31, "	3,308 "	
Quarter " M'ch 31, 1865	1,760 "	
Quarter " June 30, "	2,460 "	
Quarter " Sept. 30, "	4,000 "	
Quarter " Dec'r 31, "	3,639 "	
	17,285	
Tax 3 cents per ton		518,55
Third class:		
Quarter ending Sept. 30, 1864	45,990 tons	
Quarter " Dec. 31, "	37,901 "	
Quarter " M'ch 31, 1865	5,478 "	
Quarter " June 30, "	8,384 "	
Quarter " Sep. " "	10,978 "	
Quarter " Dec. 31, "	12,393 "	
	121,124 "	
Tax 5c. per ton		6,056 20
		12,946 53
CR.		
By erroneous settlement of Sept. 2, 1864		5,565 60
Due Commonwealth		$7,380 93

AUDITOR GENERAL'S OFFICE,
Harrisburg, July 11, 1866.

Settled and entered:

J. F. HARTRANFT,
Auditor General.

TREASURY OFFICE, PA.,
Harrisburg, July 12, 1866.

Approved:

M. H. TAGGART,
For W'm H. Kemble, State Treasurer.

AUDITOR GENERAL'S OFFICE,
Harrisburg, August 11, 1866.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

{ SEAL OF THE AUDITOR GENERAL'S OFFICE OF PENN'A. }

J. M. FORSTER,
For Auditor General.

8 Know all men by these presents, that we, the Erie Railway Company, and J. B. Gregg, and W'm M. Post of the borough of Susquehanna Depot, in the county of Susquehanna, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of twelve thousand six hundred and sixty-eight dollars lawful money of the United States, to be paid to the Commonwealth for the uses, intents, and purposes declared and appointed by law, to which payment, well and truly to be made, we bind ourselves, our heirs, successors, executors and administrators jointly and severally by these presents, sealed with the corporate seal of the said company, and the seals of the said , dated this fifth day of September, A. D. 1866.

The condition of this obligation is such that if the above-bounden the Erie Railway Company shall prosecute with effect its appeal from the settlement of its account with the said Commonwealth, as made by the auditor general and State treasurer thereof, on the 12th day
9 of July, A. D. 1866, and shall pay all costs and charges which the court or arbitrators having jurisdiction to hear and determine said appeal, shall award against the said company as well as any sums of money, which shall appear by the judgment of said court or the award of said arbitrators to be due by the said Erie Railway Company to the said Commonwealth, then the foregoing obligation to be void or else to be and remain in full force and virtue.

JAMES B. GREGG. [SEAL.]
W'M M. POST. [SEAL.]

{ SEAL OF THE ERIE RAILWAY COMPANY. }

ROBERT H. BERDELL,
President.

HORATIO N. OTIS, *Sec'y.*

Signed, sealed and delivered in presence of us—
F. B. STREETER.

The above bond and security approved by me.

JNO. J. PEARSON,
Pres't Judge.

Sept. 10th, 1866.

10 (Endorsement on bond:) Commonwealth of Penn'a vs. The Erie Railway Company. No. 87. November T., 1866. Bond on appeal.

I approve the within bond.

F. B. STREETER,
Pres't Judge 13th Jud. Dist., Pa.

SEPT. 5, 1866.

Filed September 12, 1866.

11 In Dauphin common pleas, No. . Term, 1866.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of The Erie Railway Company, of a plea, that they render unto the said Commonwealth the sum of twenty thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her. For that whereas the said defendants, on the 12th day of July, A. D. 1866, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of seventy-three hundred and eighty and $\frac{93}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general of this Commonwealth, and duly entered in the books of his office, as authorized and required by law, on the 11th day of July, A. D. 1866, in which the said sum of seventy-three hundred and eighty and $\frac{93}{100}$ dollars is due and owing the said plaintiff from the said defendants, with interest thereon from the 12th day of October, A. D. 1866, for tax on tonnage, per act of August 25th, 1864, for the several quarters ending Sept. 30th, and Dec. 31, 1864, March 31st, June 30th, Sept. 30th, and Dec. 31, 1865, which said account was, on the 12th day of July, A. D. 1866, submitted to, revised, and approved by the State treasurer, and a copy thereof, within thirty days thereafter, sent by the said auditor general, under his hand and seal of office, to the said defendants, and from which settlement of account the said defendants have appealed, as provided by law, whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of seven thousand three hundred and eighty and $\frac{93}{100}$ dollars. And being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the said last-mentioned sum of money.

And whereas, also, the said defendants, on the 12th day of July, A. D. 1866, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of seventy-three hundred and eighty and $\frac{93}{100}$ dollars, for money then and there had and received by the said de-

12 fendants, to and for the use of the said plaintiff. And, also, a certain further sum of seventy-three hundred and eighty and $\frac{93}{100}$ dollars, on an account settled and entered by the auditor general of this Commonwealth, against the said defendants, on the 11th day of July, A. D. 1866, for tax on tonnage, per act of August 25, 1864, &c., and approved by the State treasurer on the 12th day of July, A. D. 1866.

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of

money, respectively, to the said plaintiff on request. Yet the said defendants have disregarded their said promises, and, although often requested so to do, have not, as yet, paid any of the said several sums of money, or any part thereof; to the damage of the said plaintiff of twenty thousand dollars, and therefore she brings this suit, &c.

B. F. ETTER,
For W. M. Meredith, Attorney General.

13 (Endorsement on narr.:) No. 87. Nov. term, 1866. Commonwealth of Pennsylvania vs. Erie Railway Company. Narr. and copy of account. Filed Oct. 25th, 1866.

14 In the court of common pleas of Dauphin County, November term, 1866.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE ERIE RAILWAY COMPANY. } No. 87.

And now, to wit, Oct. 27, 1866, defendant pleads, "Nil debit, payment with leave," &c.

J. C. KUNKEL,
Att'y for Def't.

15 Among the records of the court of common pleas of Dauphin County to November term, 1866, No. 87, it is contained as follows, to wit:

Docket entry.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE ERIE RAILWAY COMPANY.

Appeal by defendant from the settlement of the auditor general and State treasurer.

Sept. 12, 1866. Appeal and specifications filed; same day bond filed.

Oct. 25, 1866. Narr. and copy of account filed; same day rule on defendant to plead on thirty days' notice or judgment. Ex. rule.

Oct. 27, 1866. Def't pleads, "Nil debit, payment with leave," &c.

December adj'd c't, 1867, I. L., December 16, 1867. Trial ordered; jury called, came, &c., twelve good and lawful men of the county of Dauphin, duly selected, summoned, returned, &c., do say—Decem. 16, 1867—after being duly sworn and affirmed, that they find in favor of the defendant.

16 April 3, 1868. Writ of error from supreme court received and filed.

DAUPHIN COUNTY, *ss:*

SEAL OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PA.

Certified from the record.
Harrisburg, May 16, 1868.
JOS. H. NISLEY,
Prothonotary.

17 In the supreme court of Pennsylvania in and for the middle district, set.

{SEAL OF THE SUPREME COURT OF PENN'A, MIDDLE DISTRICT.} The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, greeting:

Because, in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same court, by our writ, between The Commonwealth of Pennsylvania, plaintiff in error, and The Erie Railway Company, defendant in error, as it is said manifest error hath intervened to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected, and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process, and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the third Monday of May next, and this writ, that the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable James Thompson, chief justice of our said supreme court, at Harrisburg, the 2d day of April, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Commonwealth 91st.

Allowed.

WALLACE DE WITT,
Prothonotary.

18 The record and process, and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

[L. S.]
[L. S.]
[L. S.]

(Indorsed:) No. 61, May term, 1868. Supreme court of Pennsylvania, middle district. The Commonwealth of Pennsylvania, plaintiff in error, vs. The Erie Railway Company, defendant in error. Writ of error to the court of common pleas for the county of Dauphin. Returnable the 3d Monday of May, 1868.

Rule on the defendant in error to appear and plead on the return day of the writ.

Sup. c't. Filed May 17, 1869.

W. DE WITT, *P.*

April 3, 1868. Filed in Dauphin common pleas.

19 In the supreme court of Pennsylvania in and for the middle district of said court.

At a supreme court of the State of Pennsylvania, sitting in and for

the middle district of said court, at the city of Harrisburg, Penn'a, on the first Monday of May, A. D. 1868, present the Honorable James Thompson, chief justice; Daniel Agnew and George M. Sharswood, justices; and Wallace De Witt, prothonotary of the said supreme court. Among the records of the said the supreme court of Pennsylvania in and for the said middle district, to May term, A. D. 1868, No. 61, it is contained as follows, to wit:

Docket entries.

THE COMMONWEALTH OF PENNSYLVANIA, PLAINTIFF in error, plaintiff below,
vs.
THE ERIE RAILWAY COMPANY, DEFENDANT IN ERROR, defendant below.

Writ of error to the court of common pleas of Dauphin County, Penn'a, No. 87, Nov'r T., 1866.

20 Præcipe for writ of error and affidavit filed April 2, 1868. Same day writ of error to the court of common pleas of Dauphin County issued; returnable on the third Monday of May, 1868.

May 18, 1868, continued.

May 17, 1869, assignments of error filed by plaintiff in error. Same day writ of error returned, with record from the court of common pleas of Dauphin County, and filed.

May 19, 1869, called for argument, and same day submitted.

And now, to wit, July 6, 1869, this cause came on to be heard, and, on due consideration, it is ordered that the judgment of the court below be reversed, and a writ of venire facias de novo awarded.

Per curiam.

AGNEW, J.

Nov. 17, 1869, record remitted to the court of common pleas of Dauphin County.

SEAL OF THE SUPREME COURT OF PA., MIDDLE DISTRICT. Certificate from the record.
WALLACE DE WITT,
Prothonotary.

21 MIDDLE DISTRICT OF PENNSYLVANIA, *set:*

THE COMMONWEALTH OF PENNSYLVANIA, PLAINTIFF in error,
vs.
THE ERIE RAILWAY COMPANY, DEFENDANT IN ERROR.

SEAL OF THE SUPREME COURT OF PENN'A, MIDDLE DISTRICT. The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, greeting:

Whereas by virtue of our writ of error from our supreme court of Pennsylvania in and for the middle district, returnable in the said court on the third Monday of May, in the year of our Lord one thousand eight hundred and sixty-eight, a record was brought into the same court of a judgment rendered against The Commonwealth of Pennsylvania, plaintiff in error, at the suit of The Erie Railway Company, defendant in error, and it was so preceeded in our supreme court

that the said judgment was reversed, and a venire de novo awarded, and the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain. Wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Hon. James Thompson, chief justice of our supreme court, at Harrisburg, the 17th day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

WALLACE DE WITT,
Prothonotary.

22 (Endorsement on remittitur:) No. 61, May term, 1868. Supreme court of Pennsylvania, middle district. The Commonwealth of Pennsylvania, plaintiff in error, vs. The Erie Railway Company, defendant in error. Remittitur. Filed Nov'r 24, 1869.

23 In the court of common pleas of the county of Dauphin, Pennsylvania.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE ERIE RAILWAY COMPANY.

Appeal by defendant. No. 87 of Nov'r T., 1866.

Notes of trial and charge of the court.
Plea: Nil debit, payment with leave, &c.

J. M. FORSTER sworn.

Return dated 3d Nov'r, 1864, for quarter ending Sept. 30th, 1864, read as follows, to wit:

24 *Quarterly return of tonnage carried by the Erie Railway Company during the quarter ending September 30th, 1864.*

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay-beds, in the condition in which said products were taken therefrom.	There are no products of mines carried except those from the Pennsylvania Coal Co.'s mines & the mines of the Del., Lack. & West. R. R. Co., the amount of which was 164,443 tons, the tax on which those companies have agreed to pay.
2. Number of tons of 2,000 pounds each of hewn timber, animal food, including live stock; also, vegetable and other agricultural products, the value of which has not been increased by labor.	98,388$\frac{1450}{2000}$ tons. Of this amount, of 98,388$\frac{1450}{2000}$ tons, only 2,118$\frac{770}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of 96,270$\frac{680}{2000}$ tons are the products of other States or foreign countries, & passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.

3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes.	$120,544\frac{1650}{2000}$ tons. Of this amount, of $120,544\frac{1650}{2000}$ tons, only $45,990\frac{430}{2000}$ tons were received or delivered in the State of Pennsylvania, & residue of $74,554\frac{1220}{2000}$ tons are productions of other States or foreign countries, and passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.

STATE OF NEW YORK,
City and County, ss:

On this 3d day of November, A. D. 1864, personally appeared before me, a notary public in and for the county aforesaid, John Hilton, treasurer of the Erie Railway Company, who being duly sworn according to law, did depose and say that the foregoing report is true and correct.

JOHN HILTON,
Treasurer Erie Ra'w'y Co.

[Stamp.]

Sworn and subscribed before me the day and year aforesaid.

J. D. WHITE,
Notary Public, New York.

25 Letter read dated Nov'r 5, 1864, as follows:

To the auditor general of the State of Penn-sylvania:

SIR: Agreeably to the acts of assembly of the State of Pennsylvania, I send a quarterly return of tonnage carried on the Erie Railway for quarter terminating Sept. 30, 1864.

You will observe in the return that the tonnage is classified. Respectfully referring you to a protest made at the time of a former return made by this company, it is only necessary that I should now say it is not conceived that the State of Pennsylvania can lay a tax upon tonnage which merely passes through the State, or upon tonnage originating in the State but destined to a point beyond it, or originating at a point beyond it and destined to a point within the State. It is respectfully submitted that the Constitution of the United States prohibits such legislation by the State of Pennsylvania.

While, therefore, with a proper respect for the laws of Penn-
26 sylvania, this return is made, it is done protesting that the company cannot be chargeable with respect to the classes of tonnage already indicated. As these questions are pending upon an appeal already entered by this company, it is needless now to enter into further detail.

Should the judicial tribunals of the country finally determine that these sums are lawfully payable by this company, the payments will be made with the utmost promptitude and regularity.

Respectfully, your ob'd't serv't,

JOHN HILTON, *Treasurer.*

NEW YORK, *Nov.* 5, 1864.

Report for quarter ending Dec'r 31, 1864, dated March 14, 1864, read as follows:

27 *Quarterly return of tonnage carried by the Erie Railway Company during the quarter ending December*, 1864.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay-beds, in the condition in which said products were taken therefrom.	There are no products of mines carried except those from Pennsylvania Coal Co.'s mine & the mines of the Del., Lack. & West'n R. R. Co., the amount of which was $139{,}625\frac{1500}{2000}$, the tax on which those companies have agreed to pay.
2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also, vegetable and other agricultural products, the value of which has not been increased by labor.	$123{,}005\frac{430}{2000}$ tons. Of this amount, of $123{,}005\frac{430}{2000}$ tons, only $3{,}307\frac{1850}{2000}$ were received or delivered in the State of Pennsylvania, and the residue of $119{,}697\frac{680}{2000}$ tons are productions of other States or foreign countries, and passed through Pennsylvania in transitu for Western or Eastern States or foreign countries.
3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes.	$123{,}964\frac{1170}{2000}$ tons. Of this amount, of $123{,}964\frac{1170}{2000}$ tons, only $37{,}900\frac{200}{2000}$ tons were received or delivered in the State of Pennsylvania, and the residue of $86{,}063\frac{970}{2000}$ tons are productions of other States or foreign countries, and passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.

STATE OF NEW YORK,
City & County of New York, ss:

On this 14th day of March, A. D. 1865, personally appeared before me, J. D. White, notary public in and for the State aforesaid, John Hilton, treasurer of the Erie Railway Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct.

JOHN HILTON, *Treasurer.*

[Stamp.]

Sworn and subscribed before me the day and year aforesaid.
[SEAL.]
J. D. WHITE,
Notary Public, New York.

28 Letter read dated March 14, 1865, as follows:

OFFICE OF THE ERIE RAILWAY COMPANY,
New York, March 14th, 1865.

To the auditor general of the State of Pensylvania:

SIR: Agreeably to the acts of assembly of the State of Pennsylvania, I send a quarterly return of tonnage carried on the Erie Railway for the quarter terminating December, 31st, 1864.

You will observe in the return that the tonnage is classified. Respectfully referring you to a protest made at the time of a former return made by this company, it is only necessary that I should now say that it is not conceived that the State of Pennsylvania can lay a tax upon tonnage that merely passes through the State, but destined beyond it, or originating at a point within the State.

It is respectfully submitted that the Con of the United States prohibits such legislation by the State of Pennsylvania.

While therefore with a proper respect for the laws of Pennsylvania this return is made, it is done protesting that the company cannot be chargeable with respect to the classes of tonnage already indicated.

As the questions are now pending upon an appeal entered by this company, it is needless now to enter into further details.

Respectfully yours,

JOHN HILTON,
Treasurer.

29 Report for quarter ending March 31, 1865, dated May 15, 1865, read as follows:

Quarterly return of tonnage carried by the Erie Railway Company during the quarter ending March 31st, 1865.

1. Number of tons of 2,000 pounds each, the product of mines quarries, and clay-beds, in the condition in which said products were taken therefrom.	There are no products of mines carried except those from the Pennsylvania Coal Co.'s mines, & the mines of the Del., Lack. & Western R. R. Co., the amount of which was 109,619 $\frac{1500}{2000}$ tons, the tax on which, these companies have agreed to pay.
2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also, vegetable and other agricultural products, the value of which has not been increased by labor.	76,632 $\frac{1070}{2000}$ tons. Of this amount of 76,632 $\frac{1070}{2000}$ tons, only 1,760 $\frac{10}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of 74,172 $\frac{1060}{2000}$ tons are productions of other States or foreign countries, and passed through Pennsylvania in transitu for the Western or Eastern States, or foreign countries.
3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceeding classes.	71,359 $\frac{290}{2000}$ tons. Of this amount of 71,359 $\frac{290}{2000}$ tons, only 5,478 $\frac{290}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of 65,881 $\frac{1200}{2000}$ tons are productions of other States or foreign countries, and passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.

STATE OF NEW YORK,
City & County of New York, ss:

On this 16th day of May, A. D. 1865, personally appeared before me, a notary public, in and for the city aforesaid, John Hilton, treasurer of

the Erie Railway Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct.

JOHN HILTON.
Treasurer.

[Stamp.]

Sworn and subscribed before me, the day and year aforesaid.
[SEAL.] J. D. WHITE,
Notary Public, New York.

30 Letter, dated May 19, 1865, read as follows:

OFFICE OF THE ERIE RAILWAY COMPANY,
New York, May 19th, 1865.

To the auditor general of the State of Pennsylvania:

SIR: Agreeably to the acts of assembly of the State of Pennsylvania, I send a quarterly return of tonnage carried on the Erie Railway for the quarter ending March 31st 1865.

You will observe in the return that the tonnage is classified. Respectfully referring you to a protest made at the time of a former return made by this company, it is only necessary that I should now say that it is not conceived that the State of Pennsylvania can lay a tax upon tonnage which merely passes through the State, but destined to a point beyond it, and destined to a point within the State.

It is respectfully submitted that the Constitution of the United States prohibits such legislation by the State of Pennsylvania.

31 While therefore with a proper respect for the laws of Pennsylvania this return is made, it is done protesting that the company cannot be chargeable with respect to the classes of tonnage already indicated.

As the questions are now pending upon an appeal entered by this company, it is needless now to enter into further details.

Refpectfully yours,

JOHN HILTON,
Treasurer.

Report for quarter ending June 30th, 1865, dated August 4th, 1865, read as follows:

32 *Quarterly return of tonnage carried by the Erie Railway Company during the quarter ending June 30th*, 1865.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay-beds, in the condition in which said products were taken therefrom.	There are no products of mines carried except those from the Pennsylvania Coal Co.'s mines & the mines of the Del., Lack. & West. R. R. Co., the amount of which was $244{,}621\frac{100}{2000}$ tons, the tax on which those companies have agreed to pay.
2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also, vegetable and other agricultural products, the value of	$105{,}449\frac{460}{2000}$ tons. Of this amount of $105{,}449\frac{460}{2000}$ tons, only $2{,}460\frac{70}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of 102,989-

which has not been increased by labor.	$\frac{450}{2000}$ tons are products of other States or foreign countries, & passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.
3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes.	100,639$\frac{1590}{2000}$ tons. Of this amount of 100,639$\frac{1590}{2000}$ tons, only 8,384-$\frac{240}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of 92,255-$\frac{1350}{2000}$ tons are the productions of other States or foreign countries, & passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.

STATE OF NEW YORK,
City & County of New York, ss:

On this 4th day of August, A. D. 1865, personally appeared before me, a notary public in and for the State aforesaid, John Hilton, treasurer of the Erie Railway Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct.

JOHN HILTON,
Treasurer.

[Stamp.]

Sworn and subscribed before me, the day and year aforesaid.

J. D. WHITE,
Notary Public, New York.

33 Letter, dated August 4th, 1865, read as follows:

OFFICE OF THE ERIE RAILWAY COMPANY,
New York, August 4th, 1865.

To the auditor general of the State of Pennsylvania.

SIR: Agreeably to the acts of assembly of the State of Pennsylvania, I send a quarterly return of tonnage carried on the Erie Railway for quarter terminating June 30th, 1865.

You will observe in the return that the tonnage is classified. Respectfully referring you to a protest made at the time of a former return made by this company, it is only necessary that I should now say that it is not conceived that the State of Pennsylvania can lay a tax upon tonnage which merely passes through the State, but destined to a point beyond it, or originating at a point beyond it and destined to a point within the State.

It is respectfully submitted that the Constitution of the United
34 States prohibits such legislation by the State of Pennsylvania.

While therefore with a proper respect for the laws of Pennsylvania this return is made, it is done protesting that the company cannot be chargeable with respect to the classes of tonnage already indicated.

As the foregoing questions are now pending upon an appeal entered by this company, it is useless now to enter into further detail.

Respectfully yours,

JOHN HILTON,
Treasurer.

Return for quarter ending September 30th, 1865, dated Nov'r 28, 1865, read as follows:

35 *Quarterly return of tonnage carried by the Erie Railway Company during the quarter ending September 30th, 1865.*

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay beds, in the condition in which said products were taken therefrom.	There are no products of mines carried except those from Pennsylvania Coal Co.'s mines & the mines of the Del., Lack. & West. R. R. Co., the amount of which was 130,550 $\frac{700}{2000}$ tons, the tax on which those companies agree to pay.
2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also, vegetable and other agricultural products, the value of which has not been increased by labor.	119,403 $\frac{600}{2000}$ tons. Of this amount of 119,403 $\frac{600}{2000}$ tons only 4,000 $\frac{720}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of 115, 402 $\frac{1970}{2000}$ tons are productions of other States or foreign countries & passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.
3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes.	132,625 $\frac{1300}{2000}$ tons. Of this amount of 132,625 $\frac{1300}{2000}$ tons only 10,977 $\frac{1610}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of 121,627 $\frac{1600}{2000}$ tons are productions of other States or foreign countries, & passed through Pennsylvania in transitu for Western or Eastern States or foreign countries.

STATE OF NEW YORK,
City & County New York, ss :

On this 28th day of November, A. D. 1865, personally appeared before me, J. D. White, a commissioner of deeds of Pennsylvania in New York, to take affidavits and acknowledgements, &c., John Hilton, Treasurer of the Erie Railway Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct.

JOHN HILTON,
Treasurer.

[Stamp.]

Sworn and subscribed before me the day and year aforesaid.

[SEAL.] J. D. WHITE
Commissioner of Deeds for Penn'a in New York.

36 Letter of November 28th, 1865, read as follows:

OFFICE OF THE ERIE RAILWAY COMPANY,
New York, November, 28th, 1865.

To the auditor general of the State of Pennsylvania,

SIR: Agreeably to the act of assembly of the State of Pennsylvania,

I send a quarterly return of tonnage carried on the Erie Railway for the quarter terminating September 30th, 1865.

You will observe in the returns that the tonnage is classified. Respectfully referring you to the protest made at the time of a former return made by this company, it is only necessary that I should now say, that it is not conceived that the State of Pennsylvania can levy a tax upon tonnage which merely passes through the State, but destined to a point beyond it, and destined to a point within the State.

It is respectfully submitted that the Constitution of the United States prohibits such legislation by the State of Pennsylvania.

37 While, therefore, with a proper respect for the laws of the State of Pennsylvania, this return is made, it is done protesting that the company cannot be chargeable with respect to the classes of tonnage already indicated.

As the questions are now pending upon an appeal entered by this company, it is needless now to enter upon further details.

Respectfully yours,

JOHN HILTON, *Treasurer.*

Return for quarter ending December 31st, 1865, dated February 9, 1866, read as follows:

38 *Quarterly return of tonnage carried by the Erie Railway Company during the quarter ending December* 31, 1865.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay beds, in the condition in which said products were taken therefrom.	There are no products of mines carried except those of Pennsylvania Coal Co's mines & the mines of the Del., Lack. & Western R. R. Co., the amount of which was $297{,}082\frac{1700}{2000}$ tons, the taxes on which those companies have agreed to pay.
2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also, vegetable and other agricultural products, the value of which has not been increased by labor.	$132{,}526\frac{710}{2000}$ tons. Of this amount of $132{,}526\frac{710}{2000}$ tons, only $3.639\frac{1140}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of $128{,}886\frac{1370}{2000}$ tons, are productions of other States or foreign countries, & passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.
3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes.	$115{,}267\frac{570}{2000}$ tons. Of this amount of $115{,}267\frac{570}{2000}$ tons. only $12{,}393\frac{1460}{2000}$ tons were received or delivered in the State of Pennsylvania, & the residue of $102{,}873\frac{1050}{2000}$ tons, are productions of other States or foreign countries, & passed through Pennsylvania in transitu for the Western or Eastern States or foreign countries.

[Stamp.]

JOHN HILTON, *Treasurer.*

STATE OF NEW YORK, *City & County New York, ss:*

On this 9th day of February, A. D. 1866, personally appeared before me, J. D. White, commissioner of deeds for Pennsylvania in New York, John Hilton, treasurer of the Erie Railway Company, who, being duly sworn according to law, did depose and say that the foregoing report is true and correct.

JOHN HILTON.

Sworn and subscribed before me the day and year aforesaid.

J. D. WHITE,
Commissioner of Deeds for Pennsylvania, New York.

39 Settlement read dated July 12th, 1866; read to show what is claimed, as follows:

Erie Railway Company in account with the Commonwealth of Pennsylvania, Dr.

For tax on tonnage, per act of August 25, 1864, for the several quarters ending Sept. 30th & Dec'r 31st, 1864, M'ch 31st, June 30th, Sept. 30th, & Dec'r 31st, 1865, as per reports herewith filed:		
Due Commonwealth on settlement, Sept. 2, 1864		$5,565 60
Amount of verdict against company in the case of the Comm'lth vs Erie Railway Co	$761 60	
Interest on above	45 18	
		806 18
Second class:		
Quarter ending Sept. 30, 1864	2,118 tons.	
Quarter " Dec'r 31, 1864	3,308 "	
Quarter " Mc'h 31, 1865	1,760 "	
Quarter " June 30, "	2,460 "	
Quarter " Sept. 30, "	4,000 "	
Quarter " Dec'r 31, "	3,639 "	
al	17,285 "	
Tax 5 cents per ton		518 55
Third class:		
Quarter ending Sept. 30, 1864	45,990 tons.	
Quarter " Dec'r 31, "	37,901 "	
Quarter " M'ch 31, 1865	5,478 "	
Quarter " June 30, "	8,384 "	
Quarter " Sept. 30, "	10,978 "	
Quarter " Dec'r 31, "	12,393 "	
Total	121,124 "	
Tax 5 cents per ton		6,056 20
		12,946 53
CR.		
By erroneous settlement of Sept. 2, 1864		5,565 60
Due Commonwealth		$7,380 93

AUDITOR GENERAL'S OFFICE,
Harrisburg, July 11, 1866.

Settled and entered.

J. F. HARTRANFT,
Auditor General.

TREASURY OFFICE, PA.,
Harrisburg, July 12, 1866.

Approved.

M. H. TAGGART,
For W. H. Kemble, State Treasurer.

AUDITOR GENERAL'S OFFICE,
Harrisburg, Octo. 11, 1866.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

SEAL OF THE AUDITOR GENERAL'S OFFICE OF PENN'A.

D. C. MAURER,
For Auditor General.

40 *Defence.*

Protest referred to in the several letters, read as follows:

OFFICE OF THE ERIE RAILWAY COMPANY,
New York City, August 9th, 1864.

To the auditor general of the State of Pennsylvania:

Subject to all legal objections, and under protest, the Erie Railway Company hereby make the annexed return required by "An act of the legislature of Pennsylvaia, entitled 'An act imposing additional taxes for State purposes, and to abolish the revenue board,'" approved Ap'l 30th, 1864; and, referring to said return as a part hereof, the said company aver that they are not obliged by said act to pay the taxes mentioned therein, upon the tonnage, or any part of it, mentioned in said act or return; and especially that they are not obliged to pay said tonnage tax upon goods received by them without the limits of the State
41 of Pennsylvania, to be carried to and to be delivered in said State, or when so received without said State, to be only carried through, and not deliverable or delivered within, but only beyond said State; and should the said nevertheless require said company, under the penalties prescribed in said act, or otherwise, to pay the said taxes on said tonnage, or any part thereof mentioned in said return, the said company will and do hereby further protest against said required payment; and, without waiving any other objection that they may by law have thereto, they assign the following causes of objection and protest, viz:

I. That by an act of the legislature of Pennsylvania, entitled an act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the said State of Pennsylvania, approved February 16th, 1841, and the several supplements thereto, passed by the said legislature, and particularly the following:

1. An act entitled "A supplement to an act entitled 'An act to
42 authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the State of Pennsylvania,' passed the sixteenth day of February, one thousand eight hundred and forty-one," approved the twenty-sixth day of March, A. D. 1846;

2. An act approved the first day of April, A. D. 1848, entitled "A supplement to an act entitled a supplement to an act entitled an act to authorize the New York and Erie Railroad Company to construct said railroad through Susquehanna County;"

3. An act approved the fourteenth day of April, A. D. 1851, entitled "An act regulating the licensing of beer houses and houses to sell liquors in the counties of Susquehanna and Wyoming; relative to the New York and Erie Railroad; to change the name of The Legget's Gap Rail-

road Company; and to the release of Christian Hachulen as one of the sureties of Jacob Sallade, late surveyor general;"

43 4. An act approved the eleventh day of March, A. D. 1852, entitled "An act to incorporate the East Liberty North Washington and Apollo Plank-road Company; relating to the claim of Alexander McConnell; to the Buck Mountain Coal Company; and to the New York and Erie Railroad;"

5. An act approved the twenty-eighth day of April, A. D. 1852, entitled "A supplement to the act incorporating The Washington National Insurance Company of Philadelphia; relative to the Junction Canal Company; to the sale of real estate by O. P. Ballard; and to the sale of lands by the New York and Erie Railway Company;

6. An act approved the eighteenth day of April, A. D. 1853, entitled "An act extending the time for the commencement of the Athens and Ithaca Railroad; relative to the New York and Erie Railroad Company; and relative to Christian street in the district of Moyamensing, Philadelphia County;"

7. An act approved the twenty-seventh day of April, A. D. 1855, entitled "A supplement to the act incorporating the Washington

44 National Insurance Company of Philadelphia; relative to the Junction Canal Company; to the sale of real estate by O. P. Ballard; and to the sale of lands by the New York and Erie Railroad Company;"

8. Resolutions of the said legislature approved the twenty-seventh day of March, A. D. 1855, entitled "Resolutions relative to the *the* New York and Erie Railroad Company."

9. An act approved the twenty-second day of March, A. D. 1860, entitled "An act relating to the New York and Erie Railroad Company;" the State contracts with said Erie Railway Company not to tax said company beyond the amount mentioned in said last-mentioned act of assembly.

II. That the said act of April 30th, 1864, does not discriminate between goods the product of or belonging to Pennsylvania, whether carried in or from said State, and other goods, viz:

1. Goods imported from abroad and carried by said company in the original package from another State directly into Pennsylvania.

2. Goods, the product of other of the United States, carried by

45 said company from another State directly into Pennsylvania.

3. Goods of each of the last-two classes, carried by said company from another State directly through Pennsylvania and not delivered therein.

III. That the said act of April 30th, 1864, imposing said tax upon the last-mentioned three classes of goods is illegal and void, because, among other things:

1. As to said foreign goods so carried into or entirely through Pennsylvania, it is in violation of clause second, section tenth, article first of the Constitution of the United States which forbids any State, without the consent of Congress, to lay any imposts or duties on imports or exports, and also as to said foreign goods; and,

2. As to said other goods carried from other States into or directly through Pennsylvania, said act is also in violation of clause fourth, section eighth, article first of the said Constitution, which gives to Congress power to regulate commerce with foreign States and among the several States.

{ SEAL OF THE ERIE RAILWAY COMPANY. }

SAMUEL MARSH,
President.

HORATIO N. OTIS, *Sec'y.*

46 J. M. Forster, witness, deposes, as follows: "This protest accompanied the first returns made for May and June, 1864, dated August 9, 1864."

Specifications of objections to settlement, filed Sept. 13, 1866, read as follows:

In the matter of the account settled by the auditor general and State treasurer of the Commonwealth of Pennsylvania, on the 12th day of July, 1866, between the Commonwealth of Pennsylvania and the Erie Railway Company, for taxes claimed to be due to the said Commonwealth for quarters ending September 30th, 1864, December 31st, 1864, March 31st, 1865, June 30th, 1865, September, 30th, 1865, and December 31st, 1865, under the provisions of the act of the general assembly of the Commonwealth of Pennsylvania, approved, August, 25th, 1864, entitled "An Act to provide additional revenue for the use of the Commonwealth."

The said The Erie Railway Company appeals from the said settlement, a copy of which is hereto annexed, to the court of common pleas of
47 Dauphin County, Pennsylvania, and specifies the following objections to the said settlement: First. The said act of August 25th, 1864, imposes a tax upon the whole tonnage passing over the railway of the said company, without discriminating between freight transported through Pennsylvania in transit from a foreign country or another State, freight in transit between points of receipt and delivery, of which one is beyond the limits of Pennsylvania, as one class, and freight in transit between points of receipt and delivery, both in Pennsylvania, as another class. And in thus taxing the freight mentioned in the first class, i. e., that in transit from a foreign country or another State and that in transit between points of receipt and delivery, of which one is beyond the limits of Pennsylvania, the said law is repugnant to the third paragraph of the eighth section of the first article of the Constitution of the United States, which to Congress of the United States the power to regulate commerce with foreign nations
48 and among the several States; and with the second paragraph of the tenth section of the first article of the Constitution of the United States, which provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be necessary for executing its inspection laws; and it is for these and other reasons unconstitutional & void. Second. By the said settlement the Erie Railway Company is charged, under the said act of August 25th, 1864, with a tax of three cents per ton on 15,800 tons of "hewn timber, animal food, including live stock, also vegetables and other agricultural products, the value of which has not been increased by labor," and with a tax of five cents per ton on 117,200 tons of "all other articles not embraced in the preceding classes;" in all a tax of six thousand three hundred and thirty-four dollars on one hundred and twenty-three thousand tons of 2,000 pounds each of freight transported to or from points one of which is not within the State of
49 Pennsylvania, over the railway of the said company, which company is a corporation created under the laws of the State of New York, and owns and operates a railway extending from Jersey City, in the State of New Jersey and Piermont, in the State of New York to Dunkirk in the State of New York, portions of which road lie in the counties of Susquehanna and Pike, in Pennsylvania, which said tax of

six thousand three hundred and thirty-four dollars thus charged, as aforesaid, is in violation of the provisions of the Constitution of the United States above cited, and the act imposing the same is unconstitutional and void. Third. The said act of August 25th, 1864, is unconstitutional and void to the extent that it imposes a tax upon freight other than that both received and delivered within the State of Pennsylvania.

And the said company have caused the foregoing appeal and exceptions to be signed on their behalf by their President, and their
50 corporate seal to be hereto affixed, attested by their Secretary, this 4th day of April 1866.

SEAL OF THE ERIE RAILWAY COMPANY.

THE ERIE RAILWAY COMPANY,
By ROBERT H. BERDELL,
President.

HORATIO N. OTIS, *Sec'y.*

(Endorsed as follows,) Received at the office of the auditor general, Sept. 11, 1866. Filed in the court of common pleas of Dauphin County, Pennsylvania, Sept. 12, 1866.

Defendants give in evidence an act of the general assembly of Pennsylvania, approved, Feb'y 16, 1841. Penn'a Pamphlet Laws of 1841, page 28, as follows:

51 AN ACT to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the State of Pennsylvania.

Whereas the legislature of the State of New York did, at their session of one thousand eight hundred and thirty-two, constitute a body corporate by the name of "The New York and Erie Railroad Company," with power to construct a single, double, or treble railroad or way from the city of New York to Lake Erie through the southern tier of counties in said State:

Whereas it is represented that, in one of said counties, to wit, the county of Broome, bordering on the State of Pennsylvania, said company are opposed to the construction of said road by a mountain of such magnitude as to require tunneling or to be surmounted by stationary power, with immense expense to said company:

Whereas it is also represented that, by being permitted, in the
52 construction of said road, to follow the valley of the Susquehanna River a distance of about fifteen miles in the neighborhood of, and near to, said county of Broome, (though within the State of Pennsylvania,) said company might enjoy the advantages of a level and easy route:

And whereas it is alike politic and just that amity between adjoining States, in respect to their internal improvement operations, should be respected and maintained: therefore—

SECTION 1. *Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same.* That the New York and Erie Railroad Company, incorporated by the legislature of the State of New York at their session of one thousand eight hundred and thirty-two, shall have full power to extend their road through such portion of the county of Susquehanna as, in the proper construction of their road, they may find it necessary.

SECTION 2. The president and managers of said company shall
53 have power to survey, lay down, ascertain, mark, and fix such route as they shall deem expedient for the extension or continuation of their said road, with single, double, or treble track, confining themselves to the said county of Susquehanna; and the said railroad shall not pass through any burial-ground, place of public worship, or dwelling-house, without the consent of the owner, and the said company shall, within six months after ascertaining the route of said railroad, cause an accurate survey of the lines of said road to be made, a map or plot of which survey they shall cause to be filed in the office of the secretary of state, which map or plot or certified copy thereof shall be sufficient evidence of the route of said road, which may be then opened, and all the expenses thereof shall be defrayed by said company.

SECTION 3. That said company shall have power, by themselves or agents, to enter in and upon such lands as may be necessary to
54 make the railroad aforesaid, and also have liberty of taking from any land in the neighborhood gravel, stone, wood, or other materials necessary for the construction of said railroad, paying, if the owner of said land and said company can agree, the damages they shall do to said lands; or, if they cannot agree thereon, the damages shall be ascertained in the manner hereafter prescribed as to the compensation for injuries done said lands over which said railroad shall be laid.

SECTION 4. That whenever it shall be necessary for the said company to enter in and upon, and occupy for the purpose of making said railroad, any land upon which the same may be located, if the owner or owners of said land shall refuse to permit such entry and occupation, and the parties cannot agree upon the compensation to be made for any injury or supposed injury that may be done to the said land by such entry and occupation, then it shall be lawful for the court of common pleas of the county in which the said land lies, on application of either party, and at the cost and charges of said corporation, to award
55 a venire directed to the sheriff of the county, requiring him to summon a jury of six disinterested men to view, examine, and survey the said lands, tenements, or hereditaments, and estimate the injury or damages, if any, that, in their opinion, will be sustained as aforesaid, by reasons of said railroad, and report the same under their oaths and affirmations to the said court; which report, being confirmed by the said court, judgment shall be entered thereon; and the said sheriff and jurors shall be entitled to the like fees for their services as are allowed by law in other cases of special juries, to be paid by the said company. And it shall be the duty of the said jury in estimating such injury or damages to take into consideration the advantage that will be derived to the owner or owners of such land from the construction of said railroad: *Provided*, That either party may appeal to the court within thirty days after such report shall have been filed in the prothonotary's office of the proper county, in the same manner as appeals are allowed in other cases; and upon the filing of such report or inquisition, and the confirmation thereof, or upon final judgment
56 upon appeal therefrom, and the said company paying to such owner the amount in said report or judgment specified in full compensation for the injury sustained as aforesaid, the said company shall have the right of way and all other rights and privileges necessary to the full enjoyment of said road over the lands which the owner held, and they, and all who act under them, shall be acquitted and freed from all responsibility for or on account of such injury: *Provided*, That the payment of damages aforesaid for the lands through which the said

road may be laid, shall be made before the company or any person under their direction or in their employ shall be authorized to enter upon or break ground in the premises, except for the purpose of surveying and laying out said road, unless the consent of the owner or owners be first obtained.

SECTION. 5. That the said railroad shall be so constructed as not to impede or obstruct the full use or passage of any public road or roads which may cross or enter the same, and in all cases where the said railroad may cross or in any manner interfere with any existing public road, the said company shall make, or caused to be made, a good
57 and sufficient causeway or causeways to enable all persons passing or travelling said public roads to cross and pass under or over said railroad; and if the said company shall neglect or refuse to keep such way or causeways in good repair, they shall be liable to a penalty of ten dollars for every day the same shall be so neglected or refuse to be repaired, to be recovered by the supervisors of the township, with costs, for the use of the township, as debts of the like amount are by law recoverable, and shall, moreover, be liable to all actions at the suit of any person who may be aggrieved thereby.

SECTION 6. That, for the accommodation of all persons owning or possessing land through which the said railroad may pass, it shall be the duty of the said company to make, or cause to be made, a good and sufficient causeway or causeways, wherever the same may be necessary, to enable the occupant or occupants of said lands, to cross or pass on the same with wagons, carts, and implements of husbandry, as occasion may require; and the said causeway or causeways, when so made, shall be maintained and kept in good repair by said company; and
58 if said company shall neglect or refuse, on request, to make such causeway or causeways, or when made to keep the same in good order, the said company shall be liable to pay any person aggrieved thereby, all damages sustained by such persons in consequence of neglect or refusal, to be paid for and recovered before any magistrate or court having cognizance thereof: *Provided*, That the said company shall, in no case, be required to make, or cause to be made, more than one causeway through each plantation or lot of land, for the accommodation of any one person owning or possessing land through which said railroad may pass; and when any public road shall cross said railroad, the person owning or possessing land through which said public road shall pass, shall not be entitled to require the company to erect, or keep in repair, any causeway or bridges for the accommodation of the occupant of said land.

SECTION 7. No suit or action shall be brought or prosecuted by any person or persons for any penalties incurred under this act, unless such suit or action shall be commenced within ten months next after the offence shall have been committed, or the cause of action shall
59 have accrued; and the defendant or defendants in such suit or action may plead the general issue and give this act and the special matter in evidence, and that the same was done in pursuance and by authority of this act.

SECTION 8. If any person or persons shall wilfully and knowingly break, injure, or destroy the railroad or any part thereof to be erected by the said company in pursuance of this act, he, she, or they shall forfeit and pay to the said company three times the actual damage so sustained, to be sued for and recovered, with costs of suit, in any court having cognizance thereof, by action of debt, in the name and for the use of said company.

SECTION 9. That all suits or actions which may be brought against the said company, the service of process upon any manager, toll-gatherer, or other officer of the company, shall be as good and available in law as if made on the president thereof, and the said company shall, at all times, keep at least one manager, toll gatherer, or other officer, a resident in the county of Susquehanna.

SECTION 10. All transportation on the said railroad, of whatever
60 nature or kind, shall be carried on and conducted under the superintendence and direction of said company, who shall make rules for the regulation of all travelling and transportation on the same, and alter the same as they may deem expedient: *Provided*, That in the transportation of property or persons on said railroad the citizens of this Commonwealth shall enjoy equal privileges with those of the State of New York.

SECTION 11. If any buildings, fences, timber, or other property, situated in the county of Susquehanna, shall be destroyed by fire occasioned by sparks falling from any of the locomotive engines used upon the said road, the company shall be liable to make full compensation for all damage sustained in consequence of such fire; the damage thus sustained to be ascertained, (where the parties cannot agree,) in the same manner that other damages are ascertained and secured, agreeably to the provisions of the fourth section of this act.

WM A. CRABB,
Speaker of the House of Representatives.
CHARLES B. PENROSE,
Speaker of the Senate.

Approved the sixteenth day of February, A. D. eighteen hundred and forty-one.

DAVID R. PORTER.

61 Also an act of the general assembly of the Commonwealth of Pennsylvania, approved March 26, 1846, (Penn'a Pamphlet Laws of 1846, page 179,) as follows:

A SUPPLEMENT TO AN ACT entitled "An act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the State of Pennsylvania," passed the sixteenth day of February, one thousand eight hundred and forty-one.

SECTION 1. *Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same*, That the act entitled "A supplement to an act entitled 'An act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the State of Pennsylvania,'" passed sixteenth of February, eighteen hundred and forty-one, be, and it is hereby, amended so as to authorize the said New York and Erie Railroad Company to extend the line of their said railroad from a point near the village
62 of Port Jervis, in Orange County, State of New York, across the Delaware River, into the county of Pike, and thence up the valley and near the shore of said river, within the said county, a distance not exceeding thirty miles, to a point not exceeding ten miles above the mouth of the Lackawaxen River, and thence to recross the Delaware River to the easterly side thereof, in the county of Sullivan, State of New York: *Provided*, That the said road shall recross the Delaware River into the State of New York not less than three nor more than ten

miles above the mouth of the Lackawaxen River: *And provided further*, That it shall be so constructed on the Pennsylvania shore as not to impede or obstruct the Delaware and Hudson Canal Company in the erection of an aqueduct across the Delaware River, at or near the mouth of the Lackawaxen: *And provided further*, That said road shall be so constructed as not to obstruct the rafting navigation, nor contract the natural flow and expansion of the said Delaware River at high floods; nor shall the said railroad company, in any manner, disturb or
63 injure the works, or impede the business of the Delaware and Hudson Canal Company: *Provided, also*, That the said New York and Erie Railroad shall cross the Delaware River into said county of Pike at some point between Carpenter's Point and the glass-house: *Provided, also*, That the said New York and Erie Railroad Company shall permit a connection at or near Carpenter's Point, in the county of Pike, with any railroad company now chartered, or hereafter to be chartered, by this State.

SECTION 2. All the restrictions, prohibitions, privileges, and provisions contained in the act to which this is a supplement, relating to the road therein authorized to be constructed in the county of Susquehanna, are hereby made applicable to the road herein authorized to be built in the county of Pike, and the said New York and Erie Railroad Company shall, at all times, keep at least one manager, toll-gatherer, or other officer, a resident in the said county of Pike, in addition to the one director in the aforesaid act to be kept in the county of Susquehanna.

64 SECTION 3. That this act shall not take effect until the legislature of the State of New York shall authorize, if not already authorized by them, and the said New York and Erie Railroad Company shall consent to a connection with the Blossburg and Corning Railroad, at or near Corning; and, also, a connection with the Williamsport and Elmira Railroad, at or near the village of Elmira: *Provided*, That, so far as relates to passengers or tonnage destined to, or received from, the State of Pennsylvania, said company shall so regulate their tolls and charges for motive power and transportation on said road, that they shall at no time be greater per passenger or per ton per mile on that part of their road west of Elmira, than may be charged per passenger or per ton for the same description of goods or merchandize transported over an equal distance of said road east of Elmira; and the said company shall so conduct and regulate the trade and travel on their road, whether it be with their own locomotives, cars, or other means of transportation used on said road by their agents, contractors, or other persons, that a convenient opportunity shall be
65 given at all points of intersection for persons or tonnage travelling or transported on the said road, or on such railroads or other improvements as may connect with said road, to pass to or from such railroads or other improvements connecting with said road, so that equal facilities shall be given for passengers or things to pass from or to said connecting roads or other improvements as shall be extended to passengers or things that are to be transported over the entire length or any portion of said road: *And provided*, That the said New York & Erie Railroad Company shall so regulate their tolls that the charge on anthracite and bituminous coal shall not exceed one and a half cents per ton per mile.

SECTION 4. That full right and privileges are hereby reserved to the legislature of this Commonwealth to authorize any company or companies that are now, or may hereafter be, incorporated for the construc-

tion of any railroad or canal to connect with the said New York and Erie Railroad, at any point or place within the State of Pennsylvania.

66 SECTION 5. That it shall be the duty of the president and managers of said company, as soon as said railroad shall have been completed through Susquehanna and Pike counties, Pennsylvania, to prepare a full and accurate account of the costs of that portion of said road within the territory of this State, authenticated by the oath or affirmation of the president and secretary of said company, and communicate the same to the auditor general of this Commonwealth, who shall file the statement in his office; that, after said railroad shall have been completed and in operation to Dunkirk, or shall have connected at the western end with any other improvement extending to Lake Erie, said company shall cause to be paid into the treasury of this State, annually, in the month of January, ten thousand dollars; and any neglect or refusal by said company to pay, as aforesaid, shall work a forfeiture of the rights and privileges granted by this act.

67 SECTION 6. That the stock of said company to an amount equal to the costs of the construction of that part of their road situate in Pennsylvania shall be subject to taxation by this Commonwealth in the same manner, at the same rate as other similar property is, or may be subject; and it shall be the duty of said company to cause their treasurer to pay into the treasury of this State any tax to which said proportion of stock is liable; and the said company shall annually, in the month of January, make a statement to the legislature, under the oath or affirmation of the president thereof, of its affairs and the business done upon said road during the previous year, said statement to contain a full and accurate account of the number of passengers, amount and weight of produce, merchandize, lumber, coal, and minerals transported on said road east of Dunkirk and west of Piermont.

SECTION 7. That if the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privileges of this act, the legislature reserves the right to repeal this act; and for the purpose of ascertaining whether the provisions of this act have been misused, abused, or violated, it shall be lawful for the legislature to direct

68 or the governor to order a scire facias to be issued out of the supreme court of Pennsylvania, which shall be served upon the president or any officer or agent of said corporation at least twenty days before the commencement of the term of said court, calling on said corporation to show cause wherefore the act hereby granted shall not be declared null and void, and the same may be proceeded in to final judgment in the manner now authorized by law in relation to writs of quo warranto.

FINDLEY PATTERSON,
Speaker of the House of Representatives.
DANIEL L. SHERWOOD,
Speaker of the Senate.

Approved the twenty-sixth day of March, one thousand eight hundred and forty-six.

FR'S R. SHUNK.

Also, an act of the general assembly of the Commonwealth of Pennsylvania, approved April 1, 1848, (Penn'a Pamphlet Laws of 1848, page 330,) as follows:

69 A SUPPLEMENT TO AN ACT entitled "An act to authorize the New York and Erie Railroad Company to construct said railroad through Susquehanna County.

SECTION 1. *Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same*, That so much of *of* an act passed the twenty-sixth day of March, anno Domini one thousand eight hundred and forty-six, entitled "A supplement to an act entitled 'An act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the State of Pennsylvania,'" passed the sixteenth day of February, A. D. one thousand eight hundred and forty-one, as is contained in the words following, viz: "*Provided also*, That the said New York and Erie Railroad shall cross the Delaware River, into the said county of Pike, at some point between Carpenter's Point and the glass-house: *Provided also*, That the said New York and Erie Railroad Company shall permit a connection at or near Carpenter's Point, in the county of Pike,
70 with any railroad company now chartered or hereafter to be chartered by this State," be, and is hereby, amended so as to read as follows: The said New York and Erie Railroad shall cross the Delaware River, into the said county of Pike, at some point between Carpenter's Point and Bolton Basin: *Provided*, That the said New York and Erie Railroad Company shall, by the first day of October, in the year one thousand eight hundred and fifty-two, erect a permanent and substantial bridge across the river Delaware between Sims' Clip and the rope ferry at Matamoras, with a double track, one of which shall be suitable for laying a railroad track thereon, which bridge it shall be the duty of the said company, forever thereafter, to keep in good order and repair; and at which bridge they shall be entitled to charge and receive the same rate of tolls now charged at the bridge across the river Delaware at the borough of Easton; and whenever any company incorporated or to be incorporated in Pennsylvania shall construct a railroad to the abutment of said bridge, it shall be the duty of the said New York and Erie Railroad Company to connect such Pennsyl-
71 vania railroad with the said New York and Erie Railroad by means of a branch railroad upon one of the tracks of the said bridge, and thence to their railroad at or near their depot at Port Jervis, in the State of New York; which branch railroad, together with the said New York and Erie Railroad, east and west of Carpenter's Point, shall be subject to all the provisions of the third section of the act of the twenty-sixth of March, one thousand eight hundred and forty-six, to which this is a supplement, including the prohibition of discriminating tolls: *Provided*, That no tolls shall be levied on passengers or freight transported in said railroad cars for passing over said bridge, after the connection is made with any railroad hereafter to be constructed in Pennsylvania: *Provided further*, That in case any company incorporated in Pennsylvania for the purpose shall construct a railroad to the Delaware River between the points above specified prior to the first day of October, one thousand eight hundred and fifty-two, then said New York and Erie Railroad Company shall forthwith commence, and with all proper speed construct said bridge and railroad.

SECTION 2. That the said New York and Erie Railroad Com-
72 pany shall, when said bridge is completed and in use, pay all damages done to private property, as well as any damage, immediate or consequential, which may be sustained by the owner of the rope ferry at Matamoras, his heirs or assigns, in consequence of the construction of said bridge—the last mentioned, in no event to exceed

three thousand dollars, and, in case the parties cannot agree upon the amount the same shall be ascertained and paid in the manner provided in the original act to which this is a supplement: *Provided*, That if the New York and Erie Railroad Company shall neglect or refuse to comply with the provisions of this act, the Commonwealth of Pennsylvania resumes the right to assess and collect a tax of one dollar upon said company for each passenger carried on the said New York and Erie Railroad, in Pen'sylvania, until a sum sufficient shall be so collected to construct the bridge, provided for in this act, as well as to pay all damage that may be done to private property as above provided for; and in case said company shall neglect or refuse to pay the tax hereby imposed, it shall be the duty of the canal commissioners of
73 Pennsylvania to appoint a collector, and adopt such other measures as may be necessary to enforce such payment: *Provided also*, That, if the said company shall at any time neglect to comply with or carry out any of the provisions of this supplement, the legislature reserves the right to repeal the act of the sixteenth of February, one thousand eight hundred and forty-one, and all the supplements thereto; and, for the purpose of ascertaining whether there has been any such neglect or refusal, the same proceedings shall be had as provided in the seventh section of the supplement to which this is a further supplement: *Provided further*, That nothing in this act shall be construed to exonerate the New York and Erie Railroad Company from the payment of the ten thousand dollars per annum to the Commonwealth of Pennsylvania as required by existing laws.

WILLIAM F. PACKER,
Speaker of the House of Representatives.
W'M WILLIAMSON,
Speaker of the Senate.

Approved the first day of April, one thousand eight hundred and forty-eight.

FR'S R. SHUNK.

74 Also, the fourth section of an act of the general assembly of the Commonwealth of Pennsylvania, approved April 14, 1851, (Penn'a Pamphlet Laws of 1851, page 628,) as follows:

AN ACT regulating the licensing of beer-houses and stores to sell liquors in the counties of Susquehanna and Wyoming; relative to the New York and Erie Railroad; to change the name of the Leggett's Gap Railroad Company; to the Germantown Gas Company; and to the release of Christain Hashulen as one of the sureties of Jacob Sallade, late surveyor general.

SECTION 4. That the New York and Erie Railroad Company be, and they are hereby, required, within six months from the passage of this act, to erect and at all times keep in good repair a sufficient and lawful fence on each side of their railroad, in the county of Susquehanna, where it may be necessary for the public safety, and where the owner or owners of the land, through which said road passes, have not agreed to fence said road, or have not been paid for such fencing; and
75 said company is also required, within the time aforesaid, to construct and keep in repair good and sufficient cattle guards, on each side of all public crossings in said county; and if the said company fail to comply with the provisions of this section, they shall be liable in an action of debt for the value of the property injured or destroyed as like sums are now by law recoverable; and in such case it

shall not be necessary for the plaintiff to prove negligence on the part of the company.

JOHN CESSNA,
Speaker of the House of Representatives.
BENJAMIN MATHIAS,
Speaker of the Senate.

Approved the fourteenth day of April, A. D. one thousand eight hundred and fifty-one.

W'M. F. JOHNSTON.

76 Also, the ninth section of an act of the general assembly of the Commonwealth of Pennsylvania, approved April 28, 1852, (Penn'a, Pamphlet Laws of 1852, page 476,) as follows:

A SUPPLEMENT TO THE ACT incorporating the Washington Mutual Insurance Company of Philadelphia; relative to the Junction Canal Company; to the sale of real estate by O. P. Ballard; and to the sale of lands by the New York and Erie Railroad Company.

SECTION 9. That the titles to certain lands heretofore purchased by the New York and Erie Railroad Company, for the purposes of obtaining the right of way, water privileges, and of erecting machine shops, buildings, and fixtures, in the counties of Susquehanna and Pike, is hereby confirmed and made valid, and the said company authorized, empowered, and required to sell and convey such portions of said lands
77 as may not be necessary for the legitimate purposes of the said railroad, and make title for the same to the purchaser: *Provided*, That the number of acres of land which it shall be lawful for said company to hold and possess, from and after the first of January, eighteen hundred and fifty-four next, shall not exceed fifty acres in any one county.

JOHN S. RHEY,
Speaker of the House of Representatives.
JOHN H. WALKER,
Speaker of the Senate.

Approved the twenty-eighth day of April, A. D. one thousand eight hundred and fifty-two.

W'M BIGLER.

78 Also, the second section of an act of the general assembly of the Commonwealth of Pennsylvania, approved April 18, 1853, (Penn'a Pamphlet Laws of 1853, page 510,) as follows:

AN ACT extending the time for the commencement of the Athens and Ithaca Railroad; relative to the New York and Erie Railroad Company; and relative to Christian street, in the district of Moyamensing, Philadelphia County.

SECTION 2. That the New York and Erie Railroad Company is hereby authorized to hold and possess an additional quantity of fifty acres of land in Susquehanna County, for the purposes mentioned in the ninth section of an act supplement to an act incorporating the Washington Mutual Insurance Company of Philadelphia, and relative to the New York and Erie Railroad Company, approved April twenty-fifth, one thousand eight hundred and fifty-two; and the period limited in said section for conveying certain lands is hereby extended to the first of January, one thousand eight hundred and fifty-six, and that

79 said company is hereby authorized to sell and convey such lands as are held by it in Pike County, for other purposes than those mentioned in said section, which conveyance shall be good and valid in law to the purchaser or purchasers of the same.

W'M P. SCHELL,
Speaker of the House of Representatives.
THO. CARSON,
Speaker of the Senate.

Approved the eighteenth day of April, one thousand eight hundred and fifty-three.

W'M BIGLER.

80 Also, an act of the general assembly of the Commonwealth of Pennsylvania, approved April 27, 1855, (Penn'a Pamphlet Laws, page 646,) as follows:

SUPPLEMENT TO THE ACT incorporating the Washington Mutual Insurance Company of Philadelphia; relative to the Junction Canal Company; to the sale of real estate by O. P. Ballard; and to the sale of lands by the New York and Erie Railroad Company.

SECTION 1. *Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same,* That the time limited for the sale of certain lands by the New York and Erie Railroad Company, by the ninth section of the act incorporating the Washington Mutual Insurance Company of Philadelphia; relative to the Junction Canal Company; to the sale of real estate by O. P. Ballard; and to the sale
81 of lands by the New York and Erie Railroad Company, approved April twenty-eighth, one thousand eight hundred and fifty-two, and the supplement thereto, be extended to January the first, one thousand eight hundred and sixty.

HENRY K. STRONG,
Speaker of the House of Representatives.
W'M M. HIESTER,
Speaker of the Senate.

Approved the twenty-seventh day of April, anno Domini one thousand eight hundred and fifty-five.

JA'S POLLOCK.

82 Also, resolutions relative to the New York and Erie Railroad Company, approved March 27, 1855, (Penn'a Pamphlet Laws of 1855, page 654,) as follows:

RESOLUTIONS relative to the New York and Erie Railroad Company.

RESOLUTION 1. *Be it resolved by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met,* That the New York and Erie Railroad Company be, and are hereby, required to communicate to the legislature of this Commonwealth, a statement certified under oath by their president, setting forth what quantity of land said company now hold in Pennsylvania, its location, how much they have heretofore disposed of, its value, the value of what they now hold, and when the titles to the said lands were acquired.

RESOLUTION 2. That the governor of the Commonwealth be author-

ized and requested to transmit a copy of the foregoing resolution
83 to the president of the New York and Erie Railroad Company.

HENRY K. STRONG,
Speaker of the House of Representatives.
W'M M. HIESTER,
Speaker of the Senate.

Approved the twenty-seventh day of March, anno Domini one thousand eight hundred and fifty-five.

JA'S POLLOCK.

84 Also, an act of the general assembly of the Commonwealth of Pennsylvania, approved March 22, 1860, (Penn'a Pamphlet Laws of 1860, page 223,) as follows:

AN ACT relating to the New York and Erie Railroad Company.

SECTION 1. *Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same,* That the purchaser and purchasers of the railroad, rolling stock, franchises, property, and estate, real and personal, of the New York and Erie Railroad Company, at any sale which may be decreed by the courts of the State of New York, under a decree for the foreclosure of the mortgages known as the third, fourth, or fifth mortgages of said company, or of either or all of said mortgages, shall, on complying with the terms of sale and receiving such deeds as the said supreme court shall direct, under and subject to encumbrances, and complying with such orders therein specified
85 in regard to the receiver of said property and franchises in this State as the supreme court of this State shall make and direct, become vested with all the railroad and road-bed, estate, real and personal property, rights, powers, privilege, and franchises, which the said company now possess or hold in the State of Pennsylvania, or did possess at the date of the appointment of the said receiver, subject to all the duties, penalties, taxes, restrictions, obligations, and provisions of the laws of this State relating to and concerning said company; and also subject to the liens upon said premises and the franchises of said company created by the State of New York, and by such mortgages thereupon made by the said company prior to the mortgage upon which such decree may be made as have been recorded in this State; which said mortgages are hereby ratified and confirmed, and the purchaser may convey all and singular the said property, railroad, and franchises, with the appurtenances, to any new corporation that may be or-
86 ganized under the laws of the State of New York for the purpose of owning and operating said road; and said new corporation may mortgage the same as allowed by the laws of the State of New York; but such mortgages are to be recorded in this State: *Provided,* That said mortgages shall not include or encumber the residue of said land hereinafter provided to be released from the present mortgages.

SECTION 2. The said receiver shall continue to operate said railroad, and exercise said franchises, under the orders of said courts in New York and in this State, until a corporation, so to be formed under the laws of the State of New York, shall receive possession of the same, as may be allowed by the said courts.

SECTION 3. That the supreme court of this State, upon due notice to the trustees of said mortgages and to said receiver, shall appoint a com-

missioner in said suit pending in said court, who, on due notice in writing to said trustees and receiver, shall, after examination, and after hearing said trustees and receiver, by counsel or otherwise, and such witnesses as may be offered, decide what real estate in and about
87 Susquehanna depot, in the county of Susquehanna, is reasonably necessary, in reference to the present and future use and operation of said railroad, depots, tracks, road-bed, machine shops, water stations, and other property of the said New York and Erie Railroad, and the future owners, occupiers, or operators thereof, and so that the purchaser and any future corporation may conveniently maintain and operate the said road, and use all the shops and other depots, stations, and turn-outs, wood-sheds, and wood-yards, as the same have been hitherto used, or may hereafter become necessary for the business of said railroad, and shall report the same to said court by metes and bounds; and said court shall, if said trustees or receiver desire it, hear them in reference to said report, and, upon such hearing, to change, alter, and modify the said report and boundaries, and the same to establish and confirm; and the said purchaser may take and hold the residue of said property, and sell and dispose of the same; and, upon confirming and ratifying the sales of any portion of said lands, heretofore contracted to be
88 sold by the said New York and Erie Railroad Company, may and shall be entitled to receive all arrears of purchase money due thereon.

SECTION 4. That no one of the mortgages of the said New York and Erie Railroad Company shall be held to be ratified and confirmed hereby, until and unless the trustees therein named, severally and respectively, or the survivors of them or their successors, shall release from the lien of the mortgages given to them respectively, the residue of the said real estate at Susquehanna depot, not required for said company, as hereinbefore provided; and which release they are hereby authorized to make without personal liability.

SECTION 5. That the supreme court of this State may make such order and decree for the sale of said railroad in the State of New York as they may deem advisable; and the settlement and the adjustment of the accounts of the receiver, which have heretofore or may hereafter be made in the supreme court of the State of New York, shall be final and conclusive in respect thereto; and the said receiver shall pay from the funds
89 in his hands, all sums now due for labor and service performed for said company in this State, and for materials furnished by persons in this State, and for and relating to the expenses of the proceedings in this State which the court of this State may direct.

JOHN M. THOMPSON,
Speaker of the House of Representatives.
W'M M. FRANCIS,
Speaker of the Senate.

Approved the twenty-second day of March, anno Domini one thousand eight hundred and sixty.

W'M F. PACKER.

90 THOMAS J. C. RICHARDSON, sworn on behalf the defendant.

It is now proposed to show, by the witness, the quantity of freight taken up and delivered within the State. This objected to:

1. Because the company cannot add to its return.
2. The supreme court has decided that there is no difference between

that delivered and received within or without the State, and that which is both received and delivered within the State.

CURIA. We will have the facts relating to this freight. We do not consider the company bound by a return which fails to so distinguish, and the whole of both objections will be decided on by the court after the evidence is heard; merely hearing it is not conclusive on either party. Evidence received.

At plaintiff's request, exception sealed.

JNO. J. PEARSON. [SEAL.]

WITNESS. "I am a clerk in the freight office of this Railroad Co. Have charge of all the freight. I have examined the freight account with a view to arrive at the amount of the local freight that is
91 taken up and set down in Pennsylvania. I made out the statement of local freight in Penn'a terminating 30 Sept'r, 1864, of 2d class, 2,019 tons; 3d class, 13 tons. Quarter ending Dec'r 31, 1864, of 2d class, 2,020 tons; 3d class, 3,839 tons. Quarter ending March 31, 1865, 2d class, 1,394 tons; 3d class, 651 tons. Quarter ending June 30, 1865, 2d class, 1,968 tons; 3d class, 1,154 tons. Quarter ending Sept'r 30, 1865, 2d class, 2,103 tons; 3d class, 718 tons. Quarter ending Dec'r 31, 1865; 2d class, 3,730 tons; 3d class, 757 tons. I furnished the statements on which these returns were made. Were larger during this time than since of 2d class, but about the same of 3d class. The railway starts from Jersey City, in the State of New Jersey. The main line runs to Dunkirk, 460 miles. The branch from Painted Post is 120 miles long. Branch from Hudson to Newburg, some over 30 miles. Sent to Piermont and thence freight carried by boat some 13 m's to New York. The station in Penn'a, going west, Pond's Eddy. The road runs in Penn'a in all about 38 miles—not more. The freight going east
92 from Dunkirk is mainly western freight coming from far west—comes by rail and water on the lake. Nearly all the freight carried is of that character. Several hundred times as much is through freight, as that taken up or put down in Penn'a. A vast deal of the freight on the road comes through from Chicago. The improvements in Susquehanna Co. are mainly connected with the road. We send through to Cincinnati, St. Louis, and Chicago, and bring it in same way. Sent through in bulk without change.

Cross-examined:

The office is in New York. Never had one in Penn'a. I was in one county of this State for a few days. I hold the office of classifyer of freight in the auditor's office. Receive the returns in that office from all of the agents on the road. I only know of the freights from the books of account—is derived entirely from the accounts.

(It is conceded that the $10,000 per annum to be paid by this company for leave to pass through Penn'a has been regularly paid. Also, that the tax on the capital stock, in proportion to the expendi-
93 ture in Penn'a, had all been paid down to the time of taking the appeals; and these concessions are to apply to this case, and also to No. 84 of Nov'r T., 1866. Also, that the facts proved in regard to the freight and business, and sources thereof, with the amount and termination of the road, distance through Penn'a, &c., shall apply to both cases.)

94 Points submitted in writing to the court below, as follows:

The defendant, The Erie Railway Company, by its attorney and counsel, interposed the separate defences and severally prayed the court

to declare the law to be and to instruct the jury as to the law and facts, as follows:

1. That, it being contrary to the principles of natural equity and against the general theory of taxation, to levy the tax demanded in this suit, it would not be presumed that the legislature of Pennsylvania intended to authorize the collection of such tax, and such interpretation could only be given the law when required by express language, and the act containing no express language authorizing the tax, it should be held that the defendant is not intended to be, and is not liable, under the present law, to pay the tax demanded.

2. That the tax laws of Pennsylvania, approved April 30, 1864, and August 25, 1864, if they impose upon the defendant the duty of making any return or paying any tax, only require a return of, and tax to be paid upon, the tonnage received upon the road in the State of Pennsylvania, and also delivered in that State.

3. That the evidence in the case, (including the laws of Pennsylvania, and the acts of the parties thereunder,) constitute a contract, (1,) as a contract is defined and understood upon the principles of the common law, (2,) or as the same is defined and understood under the laws and statutes of Pennsylvania, (3,) or as the same is defined and understood in the contemplation of the Constitution of the United States, and in each of said particulars, as between the Pennsylvania and New York and Erie Railroad Company and its successors, the defendant.

4. That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence in this case, are unconstitutional and void, because repugnant to that part of the tenth section of the first article of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

5. That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, in evidence, are unconstitutional and void, as being repugnant to that part of the tenth section of the first article of the Constitution of the United States, which declares that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for the execution of its inspection laws.

95 6. That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence, are also unconstitutional and void, as being repugnant to that part of the tenth section of the first article of the Constitution of the United States, which declares that no State shall, without the consent of Congress, lay any duty of tonnage.

7. That the laws of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence, are unconstitutional and void, as repugnant to that part of the eighth section of the first article of the Constitution of the United States, which declares that Congress shall have power to regulate commerce among the several States.

8. That said laws of Pennsylvania, approved the 30th day of April, 1864, and August 25, 1864, are void and of no legal validity or effect, as against the defendant, or in so far as the said law imposes or requires a tax or tonnage to be paid on tonnage or property carried into Pennsylvania from some other State or county, or carried out of Pennsylvania and bound to some other State or county, and the same is so void and of no legal validity or effect, because repugnant to some one or more of the clauses of the Constitution of the United States hereinbefore referred to.

9. That the defendant is not bound to pay the tax or sum or tonnage claimed in this case, because the law under which it is claimed, or in so far as it imposes said tax, is repugnant to the Constitution of the United States.

10. That the State of Pennsylvania has no jurisdiction or legal right to impose a tax or tonnage duty on property passing into or out of Pennsylvania over the defendant's road, and the tax or tonnage duty claimed in this suit cannot be legally collected.

11. The legislature, by the several acts heretofore referred to, having prescribed a rate of taxation of the New York and Erie Railroad Company, and there being a necessary implication of the relinquishment of the right of further taxation, the tax in question does impair the obligation of the contract, and is void.

12. The legislature, by the several acts heretofore referred to, having prescribed a rate of taxation of the New York and Erie Railroad Company, and not having expressly reserved the power to themselves, the tax in question does impair the obligation of the contract, and is void.

J. C. KUNKEL,
J. W. SIMONTON,
Attorneys for Defendants.

96 *Answer to defendant's points.*

First. The defendant comes within the words and intention of the acts of April 30, 1864, and August 25, of the same year. It is "a transportation company doing business within this Commonwealth," as mentioned in both acts. It is a "corporation or company of another State holding and enjoying a franchise, property, or privilege in this State, by virtue of the laws thereof, and must therefore make a return of the freight, and pay for the freight carried on that portion of its road within the State, as if the whole of its line of road was within this State," as provided in the act of August 25, 1864, in express words.

Second. The acts referred to do not impose a tax on goods transported through the State, nor has any such charge been made by the accounting department. It does rightly impose a tax on the internal commerce of the State; that is, on goods received, transported, and delivered within the State, and according to the decisions of the supreme court of Pennsylvania on those taken up within the State and transported beyond its borders, or received beyond the lines thereof and delivered within the State.

Third. The grant made to the defendant, a corporation of the State of New York, by the State of Pennsylvania, for permission to construct its road within this State, is a contract for a valuable consideration, and cannot be impaired or disregarded by the State so long as the company performs its part of the contract. It is binding on both parties.

Fourth. This point is answered in the negative. There is nothing in the tax imposed which impairs any contract with this company.

Fifth. There is nothing in the statutes referred to, which, according to the interpretation put on them by the accounting department and the supreme court of the State, is in conflict with the section and article of the Constitution of the United States, as assumed.

Sixth. These tax laws have no reference to a duty on tonnage within the prohibition of the Federal Constitution. The tax is equally valid as if imposed on the bushel, barrel, or car load of grain or flour, or on timber by the foot, or wood by the cord. The duty on tonnage is of an entirely different character.

Seventh. This answered in the negative under the decision of the supreme court of this State. For our own individual views see the general charge.

Eighth. Answered in the negative for the reasons given in the last preceding point, and subject to the same explanation as to our opinion, as stated in the charge.

97 Ninth. Negatived as in the two preceding points and answers.

Tenth. The jury is instructed that the tax as assessed by the department on the tonnage carried on the defendant's road, can be collected under the decision of the supreme court of Pennsylvania.

Eleventh. To deprive the State of the authority to tax this company, there must be an express relinquishment of the power, forming a contract between the State and the corporation. It can rarely if ever be implied that such a power is abandoned. We can find nothing in the act of March 26, 1846, from which it can be inferred. The sixth section of the statute requires a statement to be made annually, to the legislature, of its affairs, the business done on the road, number of passengers and amount of freight carried. Why this report, except for the purpose of future taxation? The right to tax must be relinquished, for what the parties at the time deem a sufficient consideration, else the State will not be barred.

Twelfth. The power to tax need not be reserved; it exists without any reservation. The corporation must show that it has been released, or that there was not an agreement that it should not be exercised. It is an incident of State sovereignty.

98 *Charge of the court.*

The New York and Erie Railway Company is a corporation created by the laws of the State of New York. Its road is some five hundred miles in length, passing through that State, and also through New Jersey, and running in all about thirty-eight miles through one corner of Pennsylvania, by authority of our laws. The company paid a bonus in Pennsylvania of ten thousand dollars a year, for permission to cross our borders, and at a subsequent time accepted some additional powers under a contract to pay a tax on the amount of capital expended in the State. No contract was made to relinquish the right to tax this corporation, its business or expenditure, in the future; but the defendant contends that there is an implied relinquishment of that power. Taxation is an incident to sovereignty; is essential to the very existence of a State, and is therefore never presumed to have been relinquished or abandoned, unless the same is clearly shown by express words. Such is not the case in regard to this company, consequently the taxation imposed is lawful, and applies as clearly to this corporation, doing business within the State, as if especially created by our laws. At one time the State officers undertook, by virtue of the act of 1864, to tax all the freight on transit through the State over this road. We held that such an imposition of taxes transcended the power of the legislature, and it has ever since been abandoned. That is not now claimed; but it is contended that all tonnage taken up, and again deposited in Pennsylvania, is subject to that tax, which construction we have sustained, and still consider entirely correct. It is conceded that the annuity of ten thousand dollars, also the tax on capital equal to the cost of the work, and that on tonnage within the State has been paid for the whole period of time embraced in this contest.

The only claim is for tonnage brought into Pennsylvania from other

States or taken out of this State into others, and which this company contends it is not obliged to pay. We were of opinion, and so instructed the jury on a former trial of this cause, that when the railroad company received freight in Pennsylvania for the express purpose, and under a contract to carry it to points beyond the State line, or received it in like manner in one of the other States, under a similar arrangement to bring it into this, it was not the subject of taxation; that such a law was a regulation of commerce between the States, and if you could tax the incoming or outgoing of the commodities, they could be excluded altogether, as was repeatedly declared by the Supreme Court of the United States; that such a tax was an impost or duty on imports
99 and exports, as decided in Almy vs. The State of California, (24 Howard, 169,) and, with all due deference to the opinions of others, we think so still. But for our reasons on this subject we refer to our charge, delivered at the present term, in The Commonwealth vs. The Philadelphia and Reading Railroad Company. In deference to the opinion of the supreme court of Pennsylvania, and in conformity thereto, we instruct you that if the freight in this case was of precisely the character mentioned in the charge, to wit: Received by the company in another State for the sole purpose of being brought into this, and under a contract so to carry and deliver it, or under a similar arrangement to take it out of Pennsylvania into another State, it can be taxed under the acts of April and August, 1864; and such tax can lawfully be collected, although it is obviously the intention of the legislature to tax the commodity itself, as the corporation carrier is empowered to add the amount of tax imposed to the freight of the goods, thus directly taxing the article, not the franchises or business of the corporation. We have never doubted the power of the State to tax the franchises or profits of any corporation created by or suffered to do business under its laws, and for the whole internal State commerce; but we find it difficult to distinguish, in principle, between a tax on every ton of goods carried from Ohio into Pennsylvania, or from the latter State into New York, from the transit of passengers from, into, or through a State, as held to be illegal in the passenger cases, (7 Howard 283,) and Crandall vs. The State of Nevada, (6 Wallace 36,) or the transit of goods through a State, as decided by the courts of last resort in several reported cases. Almy vs. The State of California embraces this point precisely in what is said by Ch. J. Taney, as to a charge on an export of commodities from a State. But it is said that this decision is unsound in Woodruff vs. Parham, and Hinson vs. Scott, published in the Law Register, (pp. 25 and 36, Jan. 7, 1870.) We perhaps have only been misled by it. But that Almy vs. California is better supported, both on principle and authority, than the last-named cases, we think is abundantly shown in the opinion of The Commonwealth vs. The Philadelphia and Reading Railroad Company, already cited. We also believe that taxes of this character greatly embarrass the commerce between the States, which it was intended by the framers of the Federal Constitution should be free and unembarrassed.

Our individual opinion on these questions is unimportant. We intend to follow the decisions of the supreme court; we therefore instruct you that the tax on the tonnage, as settled at the state department, is properly imposed on this railroad company for goods carried out of and into the State. This, with our answer to the several points submitted, will sufficiently cover every legal point raised in the case; and, as the facts are undisputed, we instruct you to find a verdict in favor of
100 the Commonwealth, for seven thousand three hundred and eighty

dollars and ninety-three cents, with interest thereon at the rate of six per centum, from the 12th day of October, 1866. The attorney-general has asked us to instruct you that the above-mentioned sum should bear interest after two months from the time of settlement, at the rate of twelve per cent. per annum, under the act of May 1, 1868. This instruction we decline to give, as the settlement was made long before the enactment of the law.

To this charge, and the answers to the points, the attorney general for the plaintiff, and also the counsel for the defendant, did except; at the request of each, this bill of exceptions sealed.

JNO. J. PEARSON. [SEAL.]

101 In the court of common pleas of the county of Dauphin, November term, 1866.

THE COMMONWEALTH OF PENNSYLVANIA *vs.* THE ERIE RAILWAY COMPANY. } No. 87.

And now, to wit, Jan'y 24, 1870, trial ordered, jury called, come, &c., twelve good and lawful men of the county of Dauphin, duly selected, summoned, and returned, &c., who, all being duly sworn or affirmed according to law, do 'ay, Jan'y 25, 1870, that they find in favor of the plaintiff the sum of eight thousand eight hundred thirty-four & $\frac{95}{100}$ dollars, ($8,834 95.) Feb'y 1, 1870. Judgment on the verdict.

102 In the supreme court of Pennsylvania in and for the middle district, ss:

THE ERIE RAILWAY COMPANY, PLAINTIFF IN error, defendant below, *vs.* THE COMMONWEALTH OF PENNSYLVANIA, DEfendant in error, plaintiff below.

In Dauphin common pleas. No. 87. Nov'r term, 1866.

Issue writ of error in this case to the court of common pleas of Dauphin County. Returnable the third Monday in May next.

J. C. KUNKEL & J. W. SIMONTON,
Att'ys for Pl'ff in Error.

APRIL 28, 1870.

To WALLACE DEWITT, Esq., *Proth'y Middle District:*

DAUPHIN COUNTY, *ss:*

John W. Simonton, attorney for the above-named plaintiff in error, being duly affirmed, saith that this writ of error is not entered
103 for delay.

J. W. SIMONTON,
Att'y for Pl'ff in Error.

Affirmed and subscribed before me, April 28, 1870.

WALLACE DE WITT,
Prothonotary.

(Endorsed as follows:) Filed April 28, 1870.

104 In the supreme court of Pennsylvania, in and for the middle district, set.

SEAL OF THE SUPREME COURT OF PENN'A, MIDDLE DISTRICT.

The Commonwealth of Pennsylvania, to the justices of the court of common pleas, for the county of Dauphin, greeting:

Because, in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same court, by our writ between The Erie Railway Company, plaintiff in error, and The Commonwealth of Pennsylvania, No. 87, Nov. T., 1866, Dauphin common pleas, defendant in error, as it is said, manifest error hath intervened to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information, we, willing that if any error be therein, it should be corrected, and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the third Monday of May next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable James Thompson, chief justice of our said supreme court, at Harrisburg, the 28th day of April, in the year of our Lord one thousand eight hundred and seventy, and of the Commonwealth the 93d.

Allowed.

WALLACE DE WITT,
Prothonotary.

105 (Endorsements on writ of error:)

The record and process, with all things touching the same, so full and entire as before us, they remain to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

JNO. J. PEARSON. [L. S.]

No. 89. May term, 1870. Supreme court. The Erie Railway Company, plaintiff in error, vs. The Commonwealth of Pennsylvania, defendant in error. Writ of error to the court of common pleas, for the county of Dauphin. Returnable the third Monday of May, 1870. "Rule on the defendant to appear and plead on the return day of the writ."

N. B. 10 days' notice to the parties or their counsel below necessary to compel an appearance.

WALLACE DEWITT, *Proth'y.*

KUNKEL & SIMONTON.

Filed in Dauphin common pleas, April 28, 1870.

Filed sup. c't, May 16, 1870.

106 Among the records of the court of common pleas of Dauphin County, Penn'a, to November term, 1866, No. 87, it is contained as follows, to wit:

Docket entry.

Meredith. Kunkel & Simonton.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE ERIE RAILWAY COMPANY.

Appeal by defendant from the settlement of the auditor general & state treasurer.

Sept. 12, 1866. Appeal and specifications filed. Same day, bond filed.

Oct. 25, 1866. Narr. and copy of account filed. Same day, rule on defendant to plead on thirty day's notice or judgment ex. rule.

Oct. 27, 1866. Def't pleads "nil debit; payment with leave," &c.

December adj'd c't, 1867, (I. L.,) December 16, 1867. Trial ordered jury called, came, &c., twelve good and lawful men of the county of Dauphin, duly selected, summoned, returned, &c., do say—December 16, 1867—after being duly sworn and affirmed, that they find in favor of defendant.

April 3, 1868. Writ of error from supreme court received and filed.

Nov. 24, 1869. Record from the supreme court, received and
107 filed with a certificate, that the judgment of the court of common pleas aforesaid is reversed, and a venire facias de novo awarded.

Jan'y c't, (I. L.,) Jan'y 24, 1870. Trial ordered, jury called, came, &c.; twelve good and lawful men of the county of Dauphin, duly selected, summoned, returned, &c.; who, being all duly sworn or affirmed according to law, do say—Jan'y 25, 1870—that they find in favor of the plaintiff the sum of eight thousand eight hundred thirty-four and $\frac{95}{100}$ dollars, ($8,834 95.)

Feb'y 1, 1870. Judgment on the verdict.

April 14, 1870. Notes, points, and charge filed.

April 28, 1870. Writ of error from supreme court received and filed.

SEAL OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY.

Certified from the record.
April 28, 1870.
JOS. H. NISLEY,
Proth'y.

108 *Specifications of error.*

First. The court erred in their answer to the first point submitted to them by plaintiff in error, which point and answer were as follows:

Point 1. "That, it being contrary to the principles of natural equity, and against the general theory of taxation, to levy the tax demanded in this suit, it would not be presumed that the legislature of Pennsylvania intended to authorize the collection of such tax, and such interpretation could only be given the law when required by express language; and the act containing no express language authorizing the tax, it should be held that the defendant is not intended to be, and is not liable, under the present law, to pay the tax demanded."

Answer. "The defendant comes within the words and intention of the acts of April 30, 1864, and August 25 of the same year. It is 'a transportation company doing business within this Commonwealth,' as

mentioned in both acts. It is a 'corporation or company of another State holding and enjoying a franchise, property, or privilege in this State, by virtue of the laws thereof, and must, therefore, make a return of the freight, and pay for the freight carried on that portion of its road within the State, as if the whole of its line of road was within this State,' as provided in the act of August 25, 1864, in express words."

Second. The court erred in their answer to the second point put by plaintiff in error, which point and answer were as follows:

Point 2. "That the tax laws of Pennsylvania, approved April 30, 1864, and August 25, 1864, if they impose upon the defendant the duty of making any return or paying any tax, only require a return of, and tax to be paid upon, the tonnage received upon the road in the State of Pennsylvania, and also delivered in that State."

Answer. "The acts referred to do not impose a tax on goods transported through the State, nor has any such charge been made by the accounting department. It does rightly impose a tax on the internal commerce of the State, that is, on goods received, transported, and delivered within the State; and, according to the decisions of the supreme court of Pennsylvania, on those taken up within the State and transported beyond its borders, or received beyond the lines thereof, and delivered within the State."

Fourth. The court erred in their answer to the fourth point put by the plaintiff in error, which point and answer were as follows:

Point 4. "That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence in this case, are unconstitutional and void, because repugnant to that part of the
109 tenth section of the first article of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts."

Answer. "This point is answered in the negative. There is nothing in the tax imposed which impairs any contract with this company."

Fifth. The court erred in their answer to the fifth point put by plaintiff in error, which point and answer were as follows:

Point 5. "That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, in evidence, are unconstitutional and void, as being repugnant to that part of the tenth section of the first article of the Constitution of the United States, which declares that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for the execution of its inspection laws."

Answer. "There is nothing in the statutes referred to which, according to the interpretation put on them by the accounting department and the supreme court of the State, is in conflict with the section and article of the Constitution of the United States as assumed."

Sixth. The court erred in their answer to the sixth point put by plaintiff in error, which point and answer were as follows:

Point 6. "That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence, are also unconstitutional and void, as being repugnant to that part of the tenth section of the first article of the Constitution of the United States, which declares that no State shall, without the consent of Congress, lay any duty of tonnage."

Answer. "These tax laws have no reference to a duty on tonnage

within the prohibition of the Federal Constitution. The tax is equally valid as if imposed on the bushel, barrel, or car load of grain or flour, or on timber by the foot, or wood by the cord. The duty on tonnage is of an entirely different character."

Seventh. The court erred in their answer to the seventh point put by plaintiff in error, which point and answer were as follows:

Point 7. "That the laws of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence, are unconstitutional and void, as repugnant to that part of the eighth section of the first article of the Constitution of the United States, which declares that Congress shall have power to regulate commerce among the several States."

Answer. "This answered in the negative under the decision of the supreme court of this State. For our own individual views see the general charge."

Eighth. The court erred in their answer to the eighth point put by plaintiff in error, which point and answer were as follows:

Point 8. "That said laws of Pennsylvania, approved the 30th
110 day of April, 1864, and August 25, 1864, are void and of no legal validity or effect, as against the defendant, or in so far as the said law imposes or requires a tax or tonnage to be paid on tonnage or property carried into Pennsylvania from some other State or country, or carried out of Pennsylvania and bound to some other State or country, and the same is so void and of no legal validity or effect, because repugnant to some one or more of the clauses of the Constitution of the United States hereinbefore referred to."

Answer. "Answered in the negative for the reasons given in the last preceding point, and subject to the same explanation as to our own opinion, as stated in the charge."

Ninth. The court erred in their answer to the ninth point put by plaintiff in error, which point and answer were as follows:

Point 9. "That the defendant is not bound to pay the tax or sum or tonnage claimed in this case, because the law under which it is claimed, in so far as it imposes said tax, is repugnant to the Constitution of the United States."

Answer. "Negatived as in the two preceding points and answers."

Tenth. The court erred in their answer to the tenth point of plaintiff in error, which point and answer were as follows:

Point 10. "That the State of Pennsylvania has no jurisdiction or legal right to impose a tax or tonnage duty on property passing into or out of Pennsylvania over the defendant's road, and the tax or tonnage duty claimed in this suit cannot be legally collected."

Answer. "The jury is instructed that the tax as assessed by the department on the tonnage carried on the defendant's road, can be collected under the decision of the supreme court of Pennsylvania."

Eleventh. The court erred in their answer to the eleventh point put by plaintiff in error, which point and answer were as follows:

Point 11. "The legislature, by the several acts heretofore referred to, having prescribed a rate of taxation of the New York and Erie Railroad Company, and there being a necessary implication of the relinquishment of the right of further taxation, the tax in question does impair the obligation of the contract and is void."

Answer. "To deprive the State of the authority to tax this company, there must be an express relinquishment of the power, forming a contract between the State and the corporation. It can rarely if ever be

implied that such a power is abandoned. We can find nothing in the act of March 26, 1846, from which it can be inferred. The sixth section of the statute requires a statement to be made annually to the legislature of its affiairs, the business done on the road, number of passengers and amount and weight of freight carried. Why this report, except for the purpose of future taxation? The right to tax must be relin-
111 quished, for what the parties at the time deem a sufficient consideration, else the State will not be barred."

Twelfth. The court erred in their answer to the twelfth point put by plaintiff in error, which point and answer were as follows:

Point 12. "The legislature, by the several acts heretofore referred to, having prescribed a rate of taxation of the New York and Erie Railroad Company, and not having expressly reserved the power to themselves, the tax in question does impair the obligation of the contract, and is void."

Answer. "The power to tax need not be reserved; it exists without any reservation. The corporation must show that it has been released, or that there was an agreement that it should not be exercised. It is an incident of State sovereignty."

112 Judgment entered July 7, 1870, as follows, to wit:

And now, to wit, July 7, 1870, this cause came on to be heard; and, on due consideration, it is ordered that the judgment of the court below be affirmed, this court being of the opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were in all respects in conformity with law.

Per curiam:

SHARSWOOD, J.

113 In the supreme court of Pennsylvania, sitting in and for the middle district of said court, ss:

At a supreme court of the State of Pennsylvania in and for the middle district of said court, at the city of Harrisburg, Penn'a, on the first Monday of May, A. D. 1870—present, the Honorable James Thompson, chief justice, and Daniel Agnew, and George M. Sharswood, justices, and Walace Dewitt, prothonotary of said supreme court—

Among the records of the said the supreme court of Pennsylvania in and for the middle district, to May term, 1870, No. 89, it is contained as follows, to wit:

Docket entries.

Writ of error to the court of common pleas of Dauphin County, Penn'a. No. 87, Nov'r T., 1866.

THE ERIE RAILWAY COMPANY, PLAINTIFF IN error, defendant below.
vs.
THE COMMONWEALTH OF PENNSYLVANIA, defendant in error, plaintiff below,

114 Præcipe for writ of error and affidavit filed April 28, 1870. Same day, writ of error to the court of common pleas of Dauphin County issued, returnable on the third Monday of May, 1870.

May 16, 1870. Assignments of error. Same day, writ of error re-

turned with record from the court of common pleas of Dauphin County, and filed. May 21, 1870. Called for argument and argued.

And now, to wit, July 7, 1870, this cause came on to be heard; and, on due consideration thereof, it is ordered that the judgment of the court below be affirmed, this court being of opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were in all respects in conformity with law.

Per curiam:

AGNEW, J.

115 Petition for writ of error to the Supreme Court of the United States. Citation to defendant in error. Writ of error from the Supreme Court of the United States allowed by W. Strong, justice of the Supreme Court of the United States, and bond in the penal sum of seventeen thousand dollars, approved by W. Strong, justice of the Supreme Court of the United States, received an' filed July 16, 1870. Same day, copy of writ of error for the defendant in error, to wit, The Commonwealth of Pennsylvania, received—

July 28, 1870. Service of citation accepted by the Honorable F. Carroll Brewster, attorney general of Pennsylvania, and copy of writ of error from the Supreme Court of the United States delivered to him.

{SEAL OF THE SUPREME COURT OF PA., MIDDLE DISTRICT.} Certified from the record.
WALLACE DE WITT,
Prothonotary.

116 And now here, on this day, to wit, July 16, 1870, the said The Erie Railway Company produced to the supreme court of *of* Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid, so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington, on the first Monday of December next, which writ of error is in the words and of the tenor following, to wit:

117 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

The President of the United States to the judges of the supreme court of the State of Pennsylvania, the highest court of law or equity in the said State, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between The Erie Railway Company, plaintiff in error, and The State of Pennsylvania, defendant in error, (No. 89 of the May term, 1870, of the middle district of Pennsylvania,) in which said suit the validity of a statute of the State of Pennsylvania, on the ground of repugnancy to the Constitution of the United States, is said to have been drawn in question, and the decision to have been in favor of the said statute, a manifest error has intervened to the great damage of the said plaintiff in error, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf:

You are hereby commanded that if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, to the Supreme Court of the United States, together with this writ, so that

you have the same at Washington, on the first Monday of De-
118 cember next, in the Supreme Court to be then and there held, that, the record & process aforesaid being inspected, the said Supreme Court may cause to be done therein what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this sixteenth day of July, A. D. one thousand eight hundred and seventy, and in the ninety-fifth year of the independence of the said United States.

[SEAL.] JOHN B. BEAVER,
Pro. Clerk Cir. C't U. S.

Allowed July 16, 1870.

W. STRONG,
Ass. Jus. Sup. C. U. S.

(Indorsed:) U. S. Supreme Court. The Erie Railway Company, plaintiff in error, vs. The State of Pennsylvania, def't in error. Writ of error.

Filed in the office of the prothonotary of the supreme court of Pennsylvania, in and for the middle district.
July 16, 1870.

WALLACE DE WITT,
Prothonotary.

$2 00 paid by pl'ff.

119 In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

120 *Copy of writ of error bond.*

Supreme court of the State of Pennsylvania, middle district.

Know all men by these presents that we, the Erie Railway Company, by Jay Gould, pres't, and James Fish, j'r, and L. D. Rucker, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of seventeen thousand dollars, to be paid to the said Commonwealth, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves and each of us and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the said Commonwealth of Pennsylvania has recovered a judgment in the supreme court of the State of Pennsylvania in and for the middle district against the said The Erie Railway Company for the sum $8,834 95 *dollars* and costs, which said judgment was rendered on the seventh day of
121 July, A. D. 1870; and whereas the said The Erie Railway Company, in order to obtain a reversal of the same, have sued out a writ of error to the Supreme Court of the United States: Now, therefore, if the above-named The Erie Railway Company shall prosecute their said writ with effect, and shall answer all costs and damages,

and pay the said judgment if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

{SEAL OF THE ERIE RAILWAY COMPANY.} ERIE RAILROAD COMPANY.
By JAY GOULD, *Pres't.*
JAMES FISK, J'R.
LEWIS D. RUCKER.

Executed and delivered in the presence of—
MORTIMER SMITH.

STATE OF NEW YORK,
City and County of New York.

Be it remembered that, on this 13th day of July, 1870, before me personally came Jay Gould, the president of the Erie Railway Company, to me known, who, being by me duly sworn, said that he was president of said company; that the seal attached to the above instrument was the corporate seal of said company; and that he executed the above
122 instrument as the voluntary act and deed of said company; also, personally appeared James Fisk j'r, and Lewis D. Rucker, both to me personally known to be the individuals described in and who executed the above instrument, and severally acknowledged that they executed the same.

In testimony whereof I have hereunto set my hand and official seal the day and year above written.

{SEAL OF MORTIMER SMITH, COM'R OF DEEDS.} MORTIMER SMITH,
Commissioner of Deeds for Pennsylvania in New York.

(Endorsed as follows:) The Erie Railway Company, plaintiff in error, vs. The State of Pennsylvania, def't in error. U. S. Supreme Court bond.

Bond and sureties approved.

W. STRONG, *J.*

JULY 16, 1870.

Filed in the office of the prothonotory of the supreme court of Pennsylvania in and for the middle district, July 16, 1870.

WALLACE DE WITT,
Prothonotary.

123 The United States of America to the State of Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error issued from the Supreme Court of the United States to the supreme court of Pennsylvania, wherein The Erie Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, viz., in a suit, No. 89, of the May term, 1870, (middle district,) of the said supreme court of Pennsylvania, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Strong, one of the associate judges of the Supreme Court of the United States, this sixteenth day July, A. D. 1870.

W. STRONG.

I accept service for defendant in error.

F. CARROL BREWSTER,
Attorney General of Penn'a.

JULY 28, 1870.

(Indorsed:) U. S. Supreme Court. The Erie Railway Company, plaintiff in error, vs. The State of Pennsylvania, def't in error. Citation.

Filed in the office of the prothonotary of the supreme court of Pennsylvania in and for the middle district. July 16, 1870.

WALLACE DE WITT,
Prothonotary.

124 STATE OF PENNSYLVANIA:

In testimony that the foregoing, contained on pages one to one hundred and twenty-three, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately depending therein to No. 89 of the May term, 1870, middle district, wherein The Erie Railway Company was plaintiff in error, and The Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court this fourteenth day of November, A. D. one thousand eight hundred and seventy.

[SEAL.]

ROBT SNODGRASS,
Prothonotary Sup. C't of Pa., Middle District.

125 Supreme Court of the United States. In error of December term, A. D. 1870.

THE ERIE RAILWAY COMPANY
vs.
THE COMMONWEALTH OF PENNSYLVANIA.

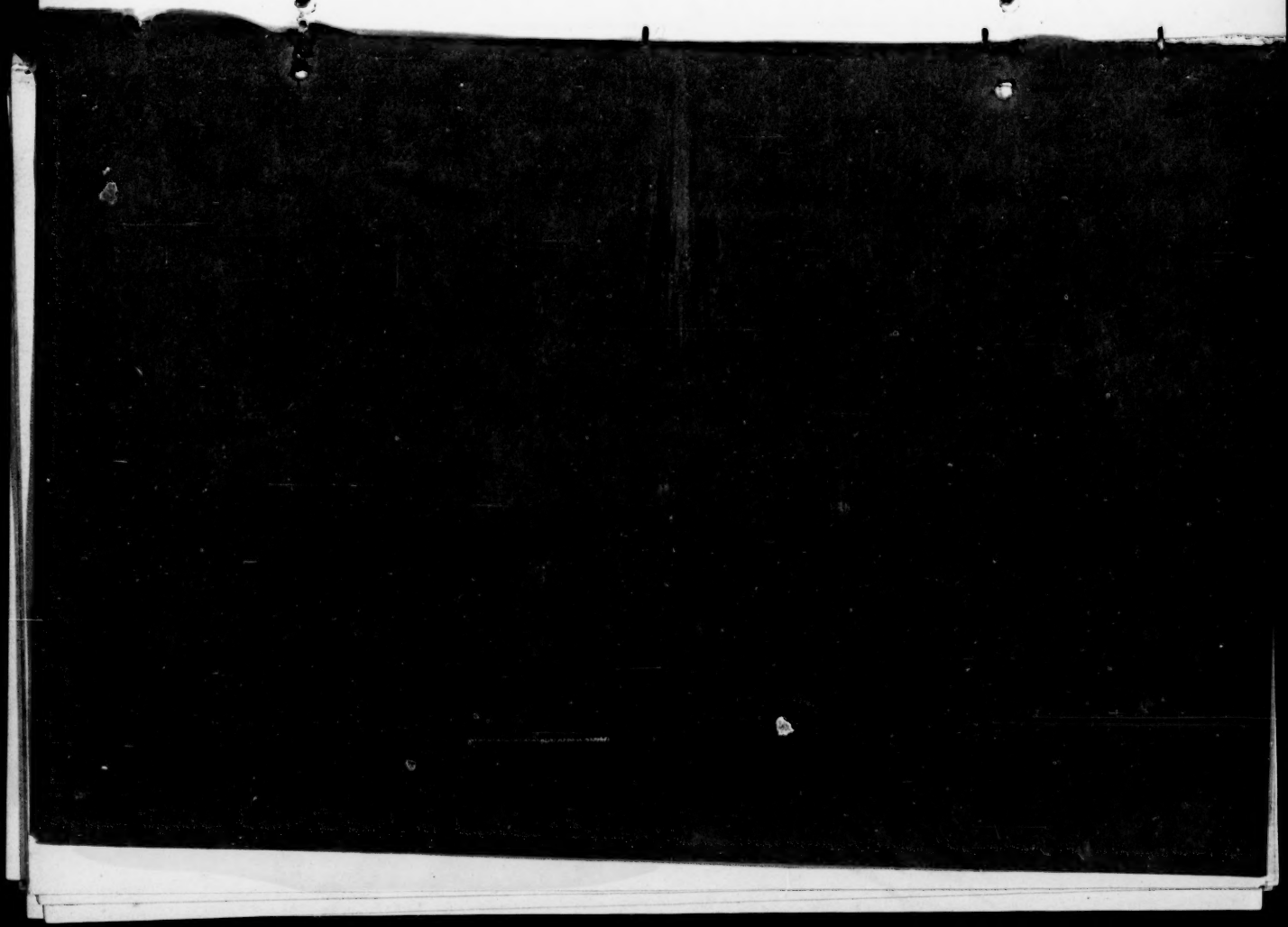
Afterwards, to wit, on the day of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Erie Railway Company, by J. W. Simonton, its attorney, and says that, in the record and proceedings aforesaid, there is manifest error in this, to wit, that the declaration aforesaid and the matters therein contained are not sufficient in law for the said The Commonwealth of Pennsylvania to have or maintain its aforesaid action thereof against the said The Erie Railway Company; that there is also error in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid given was given for the said The Commonwealth of Pennsylvania against the said The Erie Railway Company, whereas by the law of the land and the Constitution of the United States the said judgment ought to have been given for the said The Erie Railway Company against the said The Commonwealth of Pennsylvania; and the said The Erie Railway Com-
126 pany prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be re-

stored to all things which it hath lost by occasion of said judgment. And it will pray, &c.

J. W. SIMONTON,
Att'y for Pl'ff in Error.

(Indorsed:) Supreme Court of the United States of December term, A. D. 1870. No. 405. The Erie Railway Company v. The Commonwealth of Pennsylvania. Assignment of error. Filed 14th December, 1870.

(Indorsement on cover:) No. 405. The Erie Railway Company, plaintiff in error, vs. The State of Pennsylvania. Pennsylvania sup. court. Filed 14th December, 1870.



Supreme Court of the United States.

THE ERIE RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Brief on behalf of the Plaintiff in Error.

BY

J. W. SIMONTON,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

THE ERIE RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

Writ of Error to the Supreme Court of the State of Pennsylvania.

STATEMENT OF THE CASE.

This case is brought here by a writ of error directed to the Supreme Court of the State of Pennsylvania, which is the highest court of law in the State, to bring up for review a judgment of that court, affirming the validity of a statute of Pennsylvania which was alleged to be repugnant to the Constitution of the United States. The case originated as follows:

In the year 1832 the Legislature of the State of New York incorporated "The New York and Erie Railroad Company" with power to construct a railway from New York city to Lake Erie; and the company was thereafter duly organized, and commenced the construction of said road.

On the 16th day of February, 1841, the Legislature of the State of *Pennsylvania*, for the reasons therein recited, passed an act, entitled "*An Act to authorize the New York and Erie railroad company to construct said road through a portion of Susquehanna county, in the State of Pennsylvania*," which provided (inter alia) as follows:

"WHEREAS, The Legislature of the State of New York did, at their session of one thousand eight hundred and thirty-two, constitute a body corporate by the name of "The New York and Erie railroad company," with power to construct a single, double, or treble railroad or way, from the city of New York to Lake Erie, through the southern tier of counties in said State:

Whereas, It is represented, that in one of said counties, to wit: the county of Browne, bordering on the State of Pennsylvania, said company are opposed in the construction of said road by a mountain of such magnitude as to require tunneling or to be surmounted by stationary power, with immense expense to said company:

Whereas, It is also represented that, by being permitted, in the construction of said road, to follow the valley of the Susquehanna river a distance of about fifeeen miles, in the neighborhood of, and near to, said county of Browne, (though within the State of Pennsylvania,) said company might enjoy the advantages of a level and easy route:

And whereas, It is alike politic and just that amity between adjoining States, in respect to their internal improvement operations, should be respected and maintained; therefore,

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same*, That the New York and Erie railroad company, incorporated by the Legislature of the State of New York at their session of one thousand eight hundred and thirty-two, shall have full power to extend their road through such portion of the county of Susquehanna as, in the proper construction of their road, they may find it necessary."—Printed record, p. 20.

And on the 26th day of March, 1846, said Legislature passed a supplement to the foregoing act, giving a further right-of-way to said New York and Erie railroad in Pennsylvania, and enacting as follows:

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That the act, entitled 'An Act to authorize the New York and Erie railroad

company to construct said road through a portion of Susquehanna county, in the State of Pennsylvania,' passed sixteenth of February, eighteen hundred and forty-one, be and it is hereby amended, so as to authorize the said New York and Erie railroad company to extend the line of their said railroad from a point near the village of Port Jervis, in Orange county, State of New York, across the Delaware river, into the county of Pike, and thence up the valley and near the shore of said river, within the said county, a distance not exceeding thirty miles, to a point not exceeding ten miles above the mouth of the Lackawaxen river, and thence to recross the Delaware river to the easterly side thereof, in the county of Sullivan, State of New York." * * * * *

"SECTION 5. That it shall be the duty of the president and managers of said company, as soon as said railroad shall have been completed through Susquehanna and Pike counties, Pennsylvania, to prepare a full and accurate account of the cost of that portion of said road within the territory of this State, authenticated by the oath or affirmation of the president and secretary of said company, and communicate the same to the Auditor General of this Commonwealth, who shall file the statement in his office; that after said railroad shall have been completed and in operation to Dunkirk, or shall have connected at the western end with any other improvement extending to Lake Erie, said company shall cause to be paid into the treasury of this State, annually, in the month of January, ten thousand dollars; and any neglect or refusal by said company to pay, as aforesaid, shall work a forfeiture of the rights and privileges granted by this act."

"SECTION 6. That the stock of said company, to an amount equal to the cost of the construction of that part of their road situate in Pennsylvania, shall be subject to taxation by this Commonwealth, in the same manner, at the same rate, as other similar property is or may be subject; and it shall be the duty of said company to cause their treasurer to pay into the treasury of this State any tax to which said proportion of stock is liable; and the said company shall, annually, in the month of January, make a statement to the Legislature, under the oath or affirmation of the president thereof, of its affairs, and the business done upon said road during the previous year; said statement to contain a full

and accurate account of the number of passengers, amount and weight of produce, merchandise, lumber, coal and minerals transported on said road east of Dunkirk, and west of Piermont."—Printed record, pp. 23 and 25.

Said company afterwards passed into the hands of a receiver, and its railroad and franchises were subsequently sold, under proceedings in the courts of New York for the foreclosure of certain mortgages which it had executed; and a new company was formed under the laws of New York, styled The Erie Railway Company, in which became vested all the rights, franchises and property of the former company, with the consent of the State of Pennsylvania, as shown by an act passed March 22, 1860, printed record, p. 30.

The last named company has at all times, since 1860, continued to maintain and operate its railway constructed through a portion of the State of Pennsylvania, as permitted by the legislation of said State above referred to, the main road extending from Jersey City through a part of New Jersey into the State of New York, thence into Pennsylvania, and again entering New York and running to Dunkirk, on lake Erie, with numerous branch lines in New York.

On the 25th day of August, 1864, an act of the General Assembly of the Commonwealth of Pennsylvania was passed, entitled "An Act to provide additional revenue for the use of the Commonwealth," the first section of which provided as follows:

"That the president, treasurer, cashier or other financial officer of every railroad company, steamboat company, canal company and slack-water navigation company, and all other companies now or hereafter doing business with the State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank road companies and bridge companies, shall, within thirty days after the first day of January, April, July and October of every year, make return, in writing, to the Auditor General, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through or upon the works of said company, for three months immediately preceding each of the above mentioned days and each of said

companies, except as aforesaid, shall, at the time of making such return, pay to the State Treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, viz:

First.—On the products of mines, quarries and clay beds, in the condition in which said products may be taken therefrom, two cents.

Second.—On hewn timber, animal food, including live stock, also on the product of the forest, vegetables and other agricultural products, the value of which has not been increased by labor, three cents.

Third.—On all other articles, five cents. Where the same freight shall be carried over or upon different but continuous lines, said freight shall be chargeable with tax, as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the State Treasurer may select and notify thereof; corporations whose lines of improvement are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements: *Provided*, Every company now or hereafter incorporated by this Commonwealth, whose line extends into any other State, and every corporation, company or individual of any other State, holding or enjoying any franchise, property or privilege whatever in this State, by virtue of the laws thereof, shall make returns of freight and pay for the freight carried over, through and upon that portion of their lines within the State, as if the whole of their respective lines were in this State."

In accordance with the terms of this act, the said company, on the 11th day of July, 1866, made a return of the tonnage carried over their railway for the quarters ending September 30, 1864, to December 31, 1865, inclusive. This return was accompanied by a respectful protest from said company, against the constitutional right of the State of Pennsylvania to impose such a tax as that provided for in said act, upon tonnage carried through the State from one point without the limits of the State, to another point without said limits, or from a point without the limits of the State,

to a point within said limits, or from a point within the limits of the State, to a point without said limits; as also against the right of said State to impose any or greater taxes upon said company, than those prescribed in the several acts granting to said company the right of way through said State. The tonnage was classified in the return, and in addition to the amount carried directly through the State, from one point without its limits to another point without its limits, upon which no tax was imposed in the settlement, it showed that 15,800 tons of freight, styled in the act second class, and 117,200, styled third class, had been carried, part of which was taken up beyond the limits of the State of Pennsylvania and carried into the State, and the rest taken up within the limits of the State and carried to points beyond said limits.—See return and protest, pp. 8 to 18, printed record.

Upon these returns the Auditor General and State Treasurer, on the 12th day of July, 1866, settled an account against the said the Erie railway company for tax on tonnage, per act of August 25, 1864, for the several quarters above stated, charging the company with a tax of $6,574 75 on freight or tonnage carried from other States or foreign countries into the State of Pennsylvania, or from the State of Pennsylvania into other States or foreign countries.—See settlement, p. 16, printed record.

The company appealed from said settlement to the court of common pleas of Dauphin county, Pennsylvania, in the manner provided for by the eleventh section of the act of March 30, 1811—Brightly's Purdon, p. 822, pl. 20,—and filed a specification of the objections to the same, as required by said act.

The specifications of appeal aver that the act of August 25, 1864, is unconstitutional and void, so far as it attempts to impose a tax upon freight, or tonnage, received within the State of Pennsylvania, and destined for and actually carried, in a continuous course of transportation, without transhipment, to points beyond the limits of the State, or received without the said State and carried in like manner to a point within said State of Pennsylvania, because repugnant to that part of the eighth section of the first article of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes; and with

that part of the tenth section of the same article, which provides that no State shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws.

The specifications also set forth that by the said settlement the Erie railway company is charged, under the said act of August 25, 1864, with a tax of three cents per ton on 15,800 tons of "hewn timber, animal food, including live stock; also, vegetable and other agricultural products, the value of which has not been increased by labor," and with a tax of five cents per ton on 117,200 tons of "all other articles not embraced in the preceding classes;" in all, a tax of $6,334 00 on 123,000 tons, of 2,000 lbs. each, of freight transported to or from points not within the State of Pennsylvania over the railway of the said company, which company is a corporation created under the laws of the State of New York, and owns and operates a railway extending from Jersey City, in the State of New Jersey, and Piermont, in the State of New York, to Dunkirk, in the State of New York, portions of which road lie in the counties of Susquehanna and Pike, in Pennsylvania, which said tax of $6,334, thus charged as aforesaid, is in violation of the Constitution of the United States above cited, and the act imposing the same is unconstitutional and void. The defendants further claimed that the Legislature having prescribed a special rate of taxation for them, which they had always paid, they were not subject to the general tax imposed on other corporations.

According to the practice in such cases, the appeal was tried in the court of common pleas of Dauphin county on issues raised by pleas of *nil debet* and payment, to an ordinary declaration in debt on the settled account filed by the Commonwealth—printed record, pp. 4 and 5.

The trial resulted in a verdict for the company, defendant.—See docket entry, printed record, p. 5.—The learned judge having instructed the jury that the act of 25th August, 1864, so far as it claimed to impose the tax in question was repugnant to the above cited provisions of the Constitution of the United States. A writ of error was taken by the State, to the judgment entered on this verdict, and in the Supreme Court the judgment was reversed and a

venire de novo awarded.—See printed record, p. 7.—The opinion delivered by Agnew, J., on behalf of a majority of the Supreme Court of Pennsylvania, (Read, J., dissenting,) will be found in 12 P. F. Smith's reports—62 Pa. St.—p. 286.

On the second trial in the court below, the protest and acts of Assembly above refered to, giving the Erie railway the right of way through a corner of Pennsylvania, on the condition therein stipulated, were given in evidence by the company, defendant, and it was admitted that the company had complied with all the conditions to be performed by it, including the payment of the $10,000 annually for the right of way, and the tax on stock provided for in said acts. The company, defendant, requested the court to give to the jury the instructions which will be found on pp. 33 and 34 of the printed record. The court charged, as shown on pp. 34–5–6 printed record, conforming to the ruling of the Supreme Court, while unable to agree with it. A verdict was thereupon rendered by the jury for $8,834 95 against defendant, upon which judgment was entered, which, on writ of error, was affirmed by the Supreme Court, the highest court of law and equity in the State; whereupon the cause was brought into this court by the defendant, by writ of error.—See printed record, p. 42.

The errors assigned in the Supreme Court of Pennsylvania will be found on pages 39, 40, 41 and 42 of the printed record, and they also appear below; the rulings of said court upon these specifications being the ground of the writ of error from this court.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of the State of Pennsylvania erred in affirming the judgment of the court below, by the order following:

"And now, to wit, July 7, 1870, this cause came on to be heard, and on due consideration, it is ordered that the judgment of the court below be affirmed, this court being of the opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were, in all respects, in conformity with law."

2. The said Supreme Court erred in not sustaining the first error assigned in said court, which was that the court below erred in

their answer to the first point submitted to them by plaintiff in error, which point and answer were as follows:

"That it being contrary to the principles of natural equity, and against the general theory of taxation, to levy the tax demanded in this suit, it would not be presumed that the Legislature intended to authorize the collection of such tax, and such interpretation could only be given the law when required by express language, and the act containing no express language authorizing the tax, it should be held that the defendant is not intended to be, and is not liable under the present law, to pay the tax demanded."

Answer. "The defendant comes within the words and intention of the acts of April 30, 1864, and August 25, of the same year. It is 'a transportation company *doing business within this Commonwealth,*' as mentioned in both acts. It is a 'corporation or company of another State holding and enjoying a franchise, property or privilege in this State by virtue of the laws thereof, and must therefore make a return of the freight and pay for the freight carried on that portion of its road within the State, as if the whole of its line of road was within this State,' as provided in the act of August 25, 1864, in express words."

3. The said Supreme Court erred in not sustaining the second error assigned in said court, which was that the court below erred in their answer to the second point put by plaintiff in error, which point and answer were as follows:

"That the tax laws of Pennsylvania, approved April 30, 1864, and August 25, 1864, if they impose upon the defendant the duty of making any return or paying any tax, only require a return of, and tax to be paid upon, the tonnage received upon the road in the State of Pennsylvania, and also delivered in that State."

Answer. "The acts referred to do not impose a tax on goods transported *through* the State, nor has any such charge been made by the accounting department. It does rightly impose a tax on the internal commerce of the State, that is on goods received, transported and delivered within the State; and, according to the decisions of the Supreme Court of Pennsylvania, on those taken up within the State and transported beyond its borders, or received beyond the lines thereof, and delivered within the State."

4. The said Supreme Court erred in not sustaining the third error assigned in said court, which was that the court erred in their answer to the fourth point put by the plaintiff in error, which point and answer were as follows:

"That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence in this case, are unconstitutional and void, because repugnant to that part of the tenth section of the first article of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

Answer. "This point is answered in the negative. There is nothing in the tax imposed which impairs any contract with this company."

5. The said Supreme Court erred in not sustaining the fourth error assigned in said court, which was that the court erred in their answer to the fifth point put by plaintiff in error, which point and answer were as follows:

"That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, in evidence, are unconstitutional and void, as being repugnant to that part of the tenth section of the first article of the Constitution of the United States, which declares that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for the execution of its inspection laws"

Answer. "There is nothing in the statutes referred to which, according to the interpretation put on them by the accounting department and the Supreme Court of the State, is in conflict with the section and article of the Constitution of the United States as assumed."

6. The said Supreme Court erred in not sustaining the fifth assignment of error in said court, which was that the court erred in their answer to the sixth point put by plaintiff in error, which point and answer were as follows:

"That the laws of the State of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence, are also unconstitutional and void, as being repugnant to that part of the tenth section of the first article of the Constitution of the United

States, which declares that no State shall, without the consent of Congress, lay any duty of tonnage."

Answer. "These tax laws have no reference to a duty on tonnage within the prohibition of the Federal Constitution. The tax is equally valid as if imposed on the bushel, barrel or car load of grain or flour, or on timber by the foot, or wood by the cord. The duty on tonnage is of an entirely different character."

7. The said Supreme Court erred in not sustaining the sixth assignment of error in said court, which was that the court erred in their answer to the seventh point put by plaintiff in error, which point and answer were as follows:

"That the laws of Pennsylvania, approved April 30, 1864, and August 25, 1864, and in evidence, are unconstitutional and void, as repugnant to that part of the eighth section of the first article of the Constitution of the United States, which declares that Congress shall have power to regulate commerce among the several States."

Answer. "This answered in the negative under the decision of the Supreme Court of this State. For our own individual views see the general charge."

8. The said Supreme Court erred in not sustaining the seventh assignment of error in said court, which was that the court erred in their answer to the eighth point put by plaintiff in error, which point and answer were as follows:

"That said laws of Pennsylvania, approved the 30th day of April, 1864, and August 25, 1864, are void and of no legal validity or effect, as against the defendant, or in so far as the said law imposes or requires a tax or tonnage to be paid on tonnage or property carried into Pennsylvania from some other State or country, or carried out of Pennsylvania and bound to some other State or country, and the same is so void and of no legal validity or effect, because repugnant to some one or more of the clauses of the Constitution of the United States hereinbefore referred to."

Answer. "Answered in the negative, for the reasons given in the last preceding point, and subject to the same explanation as to our own opinion, as stated in the charge."

9. The said Supreme Court erred in not sustaining the eighth assignment of error in said court, which was that the court erred

in their answer to the ninth point put by plaintiff in error, which point and answer were as follows:

"That the defendant is not bound to pay the tax or sum or tonnage claimed in this case, because the law under which it is claimed, in so far as it imposes said tax, is repugnant to the Constitution of the United States."

Answer. "Negatived, as in the two preceding points and answers."

10. The said Supreme Court erred in not sustaining the ninth assignment of error in said court, which was that the court erred in their answer to the tenth point of plaintiff in error, which point and answer were as follows:

"That the State of Pennsylvania has no jurisdiction or legal right to impose a tax or tonnage duty on property passing into or out of Pennsylvania over the defendant's road, and the tax or tonnage duty claimed in this suit cannot be legally collected."

Answer. "The jury is instructed that the tax as assessed by the department on the tonnage carried on the defendant's road, can be collected under the decision of the Supreme Court of Pennsylvania."

11. The said Supreme Court erred in not sustaining the tenth assignment of error in said court, which was that the court erred in their answer to the eleventh point put by plaintiff in error, which point and answer were as follows:

"The Legislature, by the several acts heretofore referred to, having prescribed a rate of taxation of the New York and Erie railroad company, and there being a necessary implication of the relinquishment of the right of further taxation, the tax in question does impair the obligation of the contract, and is void."

Answer. "To deprive the State of the authority to tax this company there must be an express relinquishment of the power, forming a contract between the State and the corporation. It can rarely, if ever, be implied that such a power is abandoned. We can find nothing in the act of March 26, 1846, from which it can be inferred. The sixth section of the statute requires a statement to be made annually to the Legislature of its affairs, the business done on the road, number of passengers and amount and weight of freight carried. Why this report, except for the purpose of

future taxation? The right to tax must be relinquished, for what the parties at the time deem a sufficient consideration, else the State will not be barred."

12. The said Supreme Court erred in their answer to the eleventh assignment of error in said court, which was that the court erred in their answer to the twelfth point put by plaintiff in error, which point and answer were as follows:

"The Legislature, by the several acts heretofore referred to, having prescribed a rate of taxation of the New York and Erie railroad company, and not having expressly reserved the power to themselves, the tax in question does impair the obligation of the contract, and is void."

Answer. "The power to tax need not be reserved; it exists without any reservation. The corporation must show that it has been released, or that there was an agreement that it should not be exercised. It is an incident of State sovereignty."

BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR.

FIRST. *The tax imposed by the act in question is, in its nature and effect, a tax upon the transportation of freight into, through or out of Pennsylvania, levied upon such freight because it is transported.*

The act is entitled "*An Act to provide additional revenue for the use of the Commonwealth,*" and the section imposing the tax levied against the plaintiffs is as follows:

"The president, treasurer, cashier, or other financial officer of every railroad company, steamboat company, canal company and slackwater navigation company, and all other companies now or hereafter doing business within this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank road companies and bridge companies, shall, within thirty days after the first days of January, April, July and October, of every year, make return in writing to the Auditor General, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through or upon the works of said company, for the three months immediately preceding each of the above-mentioned days; and each of the companies, except as aforesaid, shall, at the time of making such return, *pay to the State Treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, viz: First, on the product of mines, quarries and clay beds, in the condition in which said products may be taken therefrom, two cents; second, on hewn timber, animal food, including live stock, also, on the products of the forest, vegetable and other agricultural products, the value of which has not been increased by labor, three cents; third, on all other articles, five cents.*

Where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State Treasurer may select and notify thereof; such companies whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby im-

posed to said toll, and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements: Provided, That every company now or hereafter incorporated by this Commonwealth, whose line extends into any other State, and every corporation, company, or individual of any other State, holding and enjoying any franchises, property or privileges whatever in this State, by virtue of the laws thereof, shall make returns of freight, and pay for the freight carried over, through and upon that portion of their lines within this State, as if the whole of their respective lines were in this State."—See *Pamphlet Laws*, 1864, *p.* 988; *Brightly's Purdon's Digest, p.* 1379, *pl.* 11.

That the tax imposed by this act is, in substance and effect, a tax on the articles of commerce transported, payable because they are transported, will, we think, clearly appear from an examination of its leading provisions.

In the first place the tax is, in express terms, imposed upon the *freight carried.* The act provides that there shall be paid to the State Treasurer, for the use of the Commonwealth, *on each two thousand pounds of freight so carried, tax, at the following rates, viz:*

First. On the product of mines, quarries and clay-beds, in the condition in which said products may be taken therefrom, two cents.

Second. On hewn timber, animal food, including live stock, also on the products of the forest, vegetable and other agricultural products, the value of which has not been increased by labor, three cents.

Third. On all other articles, five cents.

It will be observed that the only condition which determines the attaching of the tax is, that there be *freight*, and that it be *carried*, whether one or one hundred, or three hundred miles, is immaterial; whenever *freight* is *carried*, it is *taxed*, the amount being determined by its character. This provision of the act points clearly to the *transportation of freight*, or articles of commerce, as the subject of the tax.

What follows, makes this still more plain:—"*Where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax, as if it had been carried*

but upon one line, and the whole tax shall be paid by such one of said companies as the State Treasurer may select and notify thereof."

If the tax be upon the railroad company, measured by the number of tons transported, why exact it from one and not from another? And why leave it to the discretion, or caprice, or favoritism, of the State Treasurer, to determine which company shall be taxed, and which shall escape taxation? If meant to be imposed upon the company, can that be called *taxation* which is so devoid of *rule* in its imposition? Would it not be rather a forced contribution, such as no Legislature can be presumed to have intended to authorize, or as would be legal if they had?

In the case of *Clarke* vs. *The Philadelphia, Wilmington and Baltimore Railroad Company* in the Court of Errors and Appeals of Delaware—Legal Intelligencer, Philadelphia, 1871, p. 260—Bates, Chancellor, speaking of an analagous provision in the act there under consideration, says:—"Still another clause in the act leading to the same conclusion"—that it was "in substance and effect, a tax upon the passenger,"—"is that proviso of the first section, which imposes only one tax in respect of a passenger traveling over several connected railroads, and charges the payment of that one tax upon the company *which first receives the passenger.* If the tax be considered as laid upon the passenger, to be paid for the privilege of making one journey by the public modes of travel within the State, this is a provision both just and convenient; but it is not reconcilable with the theory, that this is a tax levied upon the railroad company, for the privilege of exercising a public employment, in which aspect it should equally attach to each company exercising such privilege, whether the passenger conveyed by it was received from another company or not."

If this was the conclusion to which the judicial mind was necessarily brought in that case, where, at least, a rule was prescribed to determine which company should be liable to the tax in any given case, much more must it be so here, where the law, as we have seen, *leaves* [redacted] *discretion* of a single official to determine this.

But there is another provision in this act which must lead to the conclusion that the Legislature intended the tax to fall upon the freight transported. It is as follows:

"Corporations whose lines of improvement are used by others for transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed, to said tolls, and to collect the same therewith."

As all such companies would undoubtedly, if compelled to pay the tax, avail themselves of the permission here given, and add the tax to the toll, it would thus inevitably fall upon the commodities and articles of commerce carried, and as this is the certain result of the enactment, it must be presumed that it was so intended.

It may, perhaps, be argued, as no authority is in express terms given in the act to those companies which carry freight for hire, to add the amount of the tax to their existing charges, that the tax would at least fall upon them; but in answer to this, we would point out the fact that there is hardly one of these companies which has not the right, either under its special charter, or the nineteenth section of the general railroad law of Pennsylvania, (P. L. 1849, p. 86; Purd. Dig. p. 840, pl. 20,) and the decisions of the Supreme Court of the State, in *Boyle* vs. *The Railroad*, 54 Pa. St. R., (4 P. F. Smith,) 310, and *Cumberland Valley Railroad Company's Appeal*, 62 Pa. St. R., (12 P. F. Smith,) 218, without any additional legislation, to add the amount of this tax to their charges for freight. Such a provision as the one suggested would therefore have been unnecessary.

To quote again from Chancellor Bates: "The position of the carrier under this law is substantially that of one to whom public taxes are farmed out; who undertakes by contract to advance to the government a required revenue, with power by suit or distress to collect the like amount out of those on whom the tax is laid. The only imaginable difference is, that in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract, and not imposed by law, as under this act; also that different means are provided for raising the tax out of those ultimately chargeable with it; but the mode of collection under this act is none the less effectual, but far more so, than by suit or distress; for the tax is exacted from the passenger before he is allowed to enter a car or steamboat;" and we may add from the owner of the freight, before it is transported, or at least before

it is delivered to him or the consignee, or discharged from the carrier's lien at the place of delivery.

Gilpin, C. J,, in a concurring opinion in the same case, says: "Now I beg to remark, that on considering the act with the view of determining its true construction, we must look beyond its phraseology, to the substance and real meaning underlying the mere letter of the act." * *

"When I find, as I do on reading the proviso, that where, on the same occasion, the passenger travels over several connecting roads, belonging to different companies, *only one tax* of ten cents is required to be paid for traveling over all the connecting roads, and that this tax is to be paid by the company upon whose road the journey began, thus entirely exempting from taxation all the other connecting roads in the State, over which the passenger may travel in the course of his journey;" * * * "and when, in addition to this, I consider that by the fourth section of the act, the company is expressly authorized to increase its charge for transportation 'to the amount of the tax' beyond what the passenger would have been required to pay, thus making the passenger actually pay the tax before commencing his journey, I am forced to the conclusion that it cannot properly be held to be a tax on the business of the company."

We think it is manifest from this examination of the act, that it is in substance and effect a tax upon the articles of commerce carried over the road, and therefore we contend:

SECOND, *That so far as this tax law affects articles of commerce transported from one State into or through another, it amounts to a regulation of commerce, and is therefore repugnant to the clause of the Constitution of the United States which provides that Congress shall have power to regulate commerce among the several States, and hence void.*

That the transportation for purchase and sale, of the articles of freight enumerated and taxed in this act, is a commercial transaction, cannot be questioned; and when they are transported from one State to another, it is commerce among the several States. This is clear from the definition which has been given of commerce by judges of this court.

In the case of *Corfield* vs. *Coryell*, 4 Wash. C. C. R. 398, Judge Washington says: "Commerce with foreign nations and among the several States can mean nothing more than intercourse with those nations and among those States for the purposes of trade, [illegible] object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States or *by a passage over land through the States*, when such passage becomes necessary to the commercial intercourse between the States. It is this intercourse which Congress is invested with the power of regulating, and with which no State has a right to interfere."

And in deciding *Gray* vs. *The Clinton Bridge*, in the Circuit Court, which was afterwards affirmed in this court, Mr. Justice Miller says: "Navigation, however, is only one of the elements of commerce. It is an element of commerce because it affords the means of transporting passengers and merchandise, the interchange of which is commerce itself. Any other mode of effecting this would be as much an element of commerce as navigation. When this transportation or interchange of commodities is carried on by land, it is commerce as much as when carried on by water; and the power of Congress to regulate it is as ample in the one case as in the other. The 'commerce among the States,' spoken of in the Constitution, must at the time that instrument was adopted, have been mainly of this character, for the steamboat, which has created our great internal commerce on the rivers, was then unknown." 7 Am. L. Reg. (N. S.) 149.

In the *Passenger Cases*, 7 Howard, 416, Wayne, J., quoting Marten's Summary of the Law of Nations, says: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in *transporting the merchandise from the seller to the buyer to gain the freight.*"

In *Groves* vs. *Slaughter*, 15 Peters, 511, Baldwin, J., says: "Commerce among the States, as defined by this court, is trade, traffic, intercourse, and dealing in articles of commerce between States by its citizens or others, and carried on in more than one State."

It thus clearly appears that the term "commerce," as used in the Constitution of the United States, includes the transportation

of commodities and articles of traffic from one State to another, in the manner in which the articles claimed to be taxed in this case were transported.

Does this act then, which taxes the transportation of freight from State to State, and requires the owner of such freight, so transported, to pay the tax, amount to a regulation of commerce, such as is forbidden to the States by the clause of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes?"

That it is a regulation of commerce cannot, we think, be questioned, for when we remember the well settled principle that, where the taxing power exists at all, there is no limit to its exercise but the will of the Legislature, and that as expressed by Marshall, C. J., in *M'Culloch* vs. *State of Maryland*, 4 Wheaton, 430, "it is a question of *power*, and if the power to tax exists, it may be so exercised as to destroy," we cannot fail to see that any duty, impost, tax or burden upon commodities, or articles of traffic carried from one State to another, or upon the transportation or means of transportation, by which they are carried, capable from its nature of increase in kind, to such an extent as to seriously obstruct and impede free commerce between the States, must be a regulation of commerce.

But is it such a regulation of commerce as the States are forbidden to make? We contend that it is, and that it must be so held, whether we regard the power to regulate commerce as vested exclusively in Congress by the Constitution or not, a point upon which the members of this court have differed so much, that we shall not discuss it here.

For the purpose of this argument, we shall assume it to be settled, that there are certain subjects upon which the States have a right to legislate, either absolutely or subject to Congressional control, and that it is no valid objection to such legislation, that it does in some degree affect, incidentally at least, commerce with foreign nations, or among the several States. Belonging to this class are, in the words of Marshall, C. J., in *Gibbons* vs. *Ogden*; "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a

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All the subjects embraced within this class of legislation are, in their very nature, essentially local, and hence can be best regulated by laws local in their operation. Thus it would be practically impossible for Congress to enact any general law which would suitably regulate all bridges and ferries throughout the Union, or to establish one uniform system of pilot, quarantine and health laws, which would be fitted alike for every port in the United States. These things, from the nature of the case, can be properly regulated only by local laws, and hence must be supposed to have been left to the jurisdiction of local Legislatures, even should these laws incidentally, in their practical working, affect the operations of commerce; subject, however, to the controlling power of Congress, and this court, when they pass beyond the bounds prescribed for them. This, as we understand, is the ground and reason of the doctrine laid down by the court in *Cooley* vs. *Board of Wardens*, 12 Howard 299, and re-affirmed in *Gilman* vs. *Philadelphia*, 3 Wallace 713, and of which the court say in *Crandall* vs. *Nevada*, 6 Wallace 35, "perhaps no more satisfactory solution has ever been given of this vexed question, than the one furnished by the court in that case. After showing that there are some powers granted to Congress which are exclusive of similar powers in the States, because they are declared to be so, and that other powers are necessarily so, from their very nature, the court proceeds to say, that the authority to regulate commerce with foreign nations, and among the States, includes within its compass powers which can only be exercised by Congress, as well as powers which, from their nature, can best be exercised by the State Legislatures; to which latter class the regulation of pilots belongs. Whatever subjects of this power are, in their nature, national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

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Among the subjects thus classified as local, some, including pilot, inspection, quarantine, health and police laws generally, are in their very natures so peculiarly so, that in any given case it is only necessary to satisfy the court that the state law in question is *bona fide* one belonging to either of these classes, to induce them to uphold it. To this category belong most, if not all, of the cases cited by the learned counsel for defendant in error, in which State legislation incidentally affecting commerce has been upheld by this court.

A leading case of this class is *City of New York* vs. *Miln*, 11 Peters 104, which was an action brought by the city, to recover, from the master of a foreign vessel, who had failed to report to the mayor, the age, &c., of every passenger brought into the port by him, as required by a law of New York, the penalty prescribed by the act for such failure. The act was considered to be a police regulation, and on this ground alone was held to be constitutional.

Groves vs. *Slaughter*, 15 Peters 449, was a case involving the question of the constitutionality of an act of the Legislature of the State of Mississippi, declaring that after a certain date no slaves should be imported into that State, and the act was upheld on the ground that it was a police regulation.

To the same class belong the well known *License Cases*, 5 Howard 504, which were held, so far as they would otherwise have been obnoxious to the charge of being repugnant to the constitution of the United States, to be a valid exercise of the police power of the States. Mr. Justice Grier, in his opinion in these cases, p. 632, says: "It has frequently been decided by this court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint or punishment of crimes; for the preservation of the public peace, health and morals, must come within this category. As subjects of legistation they are from their very nature of primary importance;

they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to give way when they come into conflict or collision; *salus populi suprema lex.*" And to the same effect is what Mr. Justice M'Lean says, pp. 589, 590, in same cases. It is manifest, therefore, that neither those cases nor any others belonging to the same category, can be used as precedents in favor of any law which does not belong to the same class; and it is equally clear that the law in question in this case cannot possibly be thus classified.

The principal on which *Cooley* vs. *Board of Wardens*, 12 Howard 209, was decided is stated in the following extract from the opinion of the court, p. 319: "The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject — 'the regulation of pilots and pilotage' — is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits." * * * "It is the opinion of a majority of the court, that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined."

This case, therefore, is not an authority on any other subject but it is valuable for general purposes because of the distinction taken between the nature of the different subjects of the power to regulate commerce, which has been recognized and adopted in later cases. Mr. Justice Curtis, delivering the opinion of the court, says: "The diversities of opinion, therefore, which have existed on this subject"—the power to regulate commerce—"have arisen from different views taken of the nature of this

power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say that they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States, in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation."

"Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

This case was cited with approval on this point in *Gilman* vs. *Philadelphia*, 3 Wallace 713, and the decision of that case was put on the ground that on the facts involved in it, it was of such a local nature as brought it within the view above quoted; and in that case the court also refer to *Wilson* vs. *The Blackbird Creek Marsh Co.*, 2 Peters 250, as an important authority for the principle that subjects local in their very nature may be legislated upon by the States. We do not think it can be questioned that this is the full extent to which this latter case goes, even if it is not rather, as the dissenting Justices in *Gilman* vs. *Philadelphia* thought, an example, merely, of the exercise of the police power of the State; a view which was advanced and enforced by argument by Mr. Justice M'Lean, in his opinion in the *Passenger Cases*, where he says: "The act of the State was an internal and a police power to guard the health of its citizens. By the erection of the dam commerce could only be affected as charged, consequentially and contingently. The State neither assumed nor exercised a commercial power. In this whole case nothing more is found than a

forbearance to exercise power over a doubtful object, which should ever characterize the judicial branch of a government." 7 Howard, pp. 397–8.

We contend, therefore, that none of these cases belongs to the same class as the one now before the court. To them all may be rightly applied the language used by Mr. Justice Strong, in *Minot* vs. *Railroad Company*, Circuit Court, Delaware, reported in the Legal Intelligencer, Philadelphia, 1870, p. 369: "I apprehend it will be found on examination that the cases that have sustained State laws alleged to have been regulations of inter-state commerce, have been those that related to bridges or dams across streams wholly within a State, or other kindred subjects—things only in a restricted sense commercial subjects—*Wilson* vs. *Blackbird Creek Marsh Co.*, 2 Peters, 250; *Gilman* vs. *Philadelphia*, 3 Wallace, 713. They are exceptional. The subjects are such as in the last mentioned case it is said can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively."

Here then we have the test by which to determine the class to which any given law belongs. Inspection, quarantine and health and police laws generally, are within the legislative power of the States, on the principle that *salus populi suprema lex*, and certain other laws of an exceptional nature are so, because the subjects are such as "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively."

We believe it to be so that all the cases of State laws alleged to have been regulations of inter-state commerce, which have been sustained by this court, do belong to the above classes, and have been sustained on the above grounds. And as is said by Mr. Justice Strong, in the case above quoted: "It may safely be said that none of them are like the present. They admit, and some of them assert, that whatever subjects of the power to regulate commerce are, in their nature national, or *admit of one uniform plan or system of regulation*, may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely passage and transportation through a State are of this nature. If not, it is

unfortunate. It is of national importance that, in regard to such subjects, there should be but one regulating power, for if one State can directly tax persons and property passing through it, or indirectly by taxing the means of transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of western States may be effectually excluded from eastern markets, for though it might bear the imposition of a tax by one State, it would be crushed under the weight of many."

The ground upon which it must be held that a regulation of commerce, such as is involved in this case, is in its nature, national is here clearly indicated. The question must necessarily be looked at in this court from a national point of view. A decision that this law is constitutional cannot be made without deciding that every State in the Union may pass a law of the same kind, and that the existence of all of them at once, would not amount to a regulation of inter-state commerce. And surely this cannot be successfully maintained. All the commerce of all the States would be affected, and that not in a uniform manner, but in as many various ways, and with as many different burdens as the varying habits, caprices or necessities of the various States might suggest. The learned counsel for the defendant in error, discussing this point in another case, say: "Does the tax now under discussion 'institute a regulation of commerce of a national character,' or one which 'has a uniform operation over the whole country?' It seems almost idle to discuss such a question. Surely the dealing between the Reading railroad company and the Commonwealth of Pennsylvania as to the taxes on its business of shipping coal from the mines to Port Richmond, in Philadelphia, is not a national regulation."

This is to forget or ignore, what is undoubtedly true, that this court cannot uphold the law in question in this case without in substance and effect declaring to every Legislature of every State in the Union, that they have authority to pass a similar law, with such variations not affecting its essential principle, as they may choose to introduce; and that one of these allowable variations would be to make the tax two dollars "on each two thousand pounds of freight," instead of two cents; and thus all the commerce of the

whole Union—the commerce of the Nation—would be subject to endless regulations and exactions, which would not indeed be "uniform," but would certainly be "national" in their character. And the very fact that these regulations and exactions would not be uniform is one of the grounds upon which they must be held unconstitutional, for even the power of Congress on this subject is limited by the provision of the constitution, that all duties, imposts and excises shall be uniform, the spirit of which provision, if not the letter, would be violated by such a series of laws as would be made possible, and if possible, probable, by a decision in favor of this law.

And even if the burden and the mode of exacting it were the same in each State, it would not fall equally on the commerce of the country, but a tax being exacted for transportation in each State, the number of taxes paid upon any given article of commerce would be measured by the number of States into or through which it might pass. If this would not be regulating commerce among the States, it is hard to conceive what would be; the crossing of State lines would be the fact upon which the number of payments of tax would be conditioned.

These considerations we think clearly show, that the law in question here can receive no support from the cases heretofore referred to, which are so much relied on by the counsel for the State. They do not, as we conceive, touch the point of this case.

We contend that there is a class of cases which directly rule this; some of which have been decided by this court, and others by the highest courts of the States, in obedience to the authoritative decisions of this court.

And here we may remark, that decisions of the State courts against the constitutionality of a State law, are entitled to much more weight than those in favor of such a law, since, beside the natural leaning in favor of the act of a co-ordinate branch of the State government, as was said in a Pennsylvania case, and as is virtually said in the opinion of the Pennsylvania Supreme Court in this case, "to doubt is to be resolved" in favor of the constitutionality of the law.

One of the cases to which we refer, decided by this court, is *Almy* vs. *The State of California*, 24 Howard 169; and another is

Crandall vs. *The State of Nevada*, 6 Wallace 35. These cases were held by Mr. Justice Strong, in the Circuit Court for the State of Delaware, to rule one branch of the case of *Minot* vs. *The Philadelphia, Wilmington and Baltimore Railroad Company*, then before him. The question was as to the constitutionality of an act which provided that "every railroad company incorporated by the State, and doing business therein, should, on the first of January in each year, pay to the State Treasurer, a tax of one hundred dollars for the use in the said State of Delaware, of each locomotive belonging, in whole or in part, to such company, and at any time during the preceding year used by said company within the State of Delaware; and twenty-five dollars in like manner for the use of each passenger car, and ten dollars for each freight car." Most of these locomotives and cars were used for the purpose of transporting persons and property from Pennsylvania, into and through Delaware into Maryland. The learned Justice held, on the authority of these cases, that this act indirectly levied a tax both on persons and property for transit through the State, into it, and out of it, and that it was therefore unconstitutional. They apply as authorities with the same force to this case, and we cannot better state their character and bearing than by quoting the language of the learned Justice: "In *Almy* vs. *The State of California*, 24 H. 169, it was ruled by the Supreme Court, that a law of the State imposing a stamp duty upon bills of lading for gold or silver transported from that State to any place or port out of the State, was substantially a tax upon the transportation itself, and was unconstitutional. It is true, the decision was rested on the ground that it was a tax upon exports; and subsequently, in *Woodruff* vs. *Parham*, 8 Wallace 123, the court denied the correctness of the reason given for the decision, but they said at the same time that the case was well decided for another reason, viz: that such a tax was a regulation of commerce—a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons, between one State and another, which is within the rule laid down in *Crandall* vs. *Nevada*, 6 Wallace 35, and with the authority of Congress to regulate commerce among the States. In the very recent case of *Crandall* vs. *The State of Nevada*, 6 Wallace

35, it was held that a special tax imposed by the State on railroad and stage companies, for every passenger carried out of the State by them, was a tax on the passenger for the privilege of passing through the State by ordinary modes of travel, and not simply a tax on the business of the companies. Hence, it was ruled that the power of a State to impose such a tax, is inconsistent with rights conferred by the constitution on the Federal government and on the people, and consequently that no State can lay such a tax. The majority of the court, indeed, declined to put their decision upon the ground that the tax was a regulation of inter-state commerce, and as such, beyond the reach of the State, but all the judges agreed that the State law was unconstitutional and void. The Chief Justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the State Legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and I do not understand that the other members of the court held decisively that it was not thus inconsistent. The case in any view of it, decided that a State cannot directly or indirectly tax persons for passing through or out of it."

If the States cannot thus tax persons, they certainly cannot tax property; if persons have the right guaranteed to them by the Constitution of the United States to pass freely from and through the States, this right must extend to the same freedom of transporting their property; and this court have so said in *Woodruff* vs. *Parham*, recognizing, as above quoted, that the principle of *Crandall* vs. *Nevada*, applies to property as well as persons. Hence these cases are, as we understand them, direct authority on the question now before the court.

The case of *The Erie Railway Company* vs. *The State of New Jersey*, 2 Vroom 531, is another well considered case, and, as we think, directly in point here. It was there decided by the Court of Errors and Appeals, reversing the judgment of the Supreme Court, that a law laying a tax on railway corporations engaged in transporting goods and passengers from State to State, the tax being graduated by the weight of the goods and the number of passengers carried, was repugnant to the clause of the Constitution of the United States giving to Congress the power to regu-

late commerce among the several States. The reasoning of this case will be found, on examination, to be cogent and well sustained.

Another case, of which the same may be said, is *Clarke* vs. *The Philadelphia, Wilmington and Baltimore Railroad Company*, in the Court of Errors and Appeals of Delaware, already cited. The act in that case, in language, and with provisions so much like those of the law now in question, as to bear internal evidence of—which we understand to be the fact—having been copied and adapted from it, imposed upon the company a tax of ten cents for each passenger carried into, through or out of the State, and the court, Bates, Chancellor, and Gilpin, Chief Justice, delivering concurring opinions, pronounced it a tax on the passenger, and as such a regulation of commerce, and hence unconstitutional.

Another case directly in point is the case of the *Carson River Lumbering Company* vs. *Robert Patterson*, 33 California, 334. The Legislature of that State, in 1866, passed an act authorizing the supervisor of Alpine county to charge and collect a toll for floating and transporting saw logs and cord-wood on said river, which extended from the State of California into the State of Nevada, and an attempt was made under said act to collect such toll upon saw logs and cord-wood so transported from the State of California to the State of Nevada. The case came into the Supreme Court of the State, and the act, so far as related to articles transported from one State to another, was held by the court to be unconstitutional and void. The court say:

"It is not claimed, nor can there be any pretence for claiming, that the act whose constitutionality is brought in question in this action is a police regulation. It has no bearing on public health, public morals or public society. It was passed for the sole purpose of raising revenue off a portion of the traffic between California and a sister State, a commerce in which both States were and are alike interested, and the control of which is vested in the general government alone, the common superior of both."

"But the attempt to regulate inter-state commerce in this case is by an impost on coal and lumber, considered as exports from California, and the power to regulate commerce between the States

in that particular way is prohibited to the States by an express provision of the Constitution. The toll imposed by the terms of the act for the use of the river, though different in form from a duty or tax on the wood or lumber transported, is, in substance, the same thing. *Almy* vs. *California*, 24 How., 174; *Brannagen* vs. *Tillinghast*, 18 Cal., 266."

Another case is *People* vs. *Raymond*, 34 Cal., 492. In this case it appeared that, by an act of the Legislature of California, passed in 1862, it was made a penal offence for any person authorized to sell passenger tickets, or to make contracts for the passage, on vessels or steamers about to leave the port of San Francisco for any port without the limits of the State, to issue any such ticket, or make any such contract for passage, without having first procured and placed certain stamps, to be issued by the State, on such ticket, or on the memorandum of the contract, or if the contract was verbal, without having first paid to the stamp inspector the price of the stamps. The court held that as a State cannot accomplish by indirect methods what it is forbidden to do directly, this tax was a regulation of commerce in the sense of the Constitution, and therefore the act imposing it was unconstitutional and void.

We think we may say, without fear of successful contradiction, that no tax law, similar to the one in question, which has succeeded in passing the barrier of the highest State court—which, indeed, few of them have done—has been endorsed by this court; and that the decisions and principles here laid down, must forbid this to be done.

But it is argued that our case differs from the cases above cited, in that here the tax falls upon the internal commerce of the State as well as upon inter-state commerce, while in those cases it did not. We admit that in most, though not in all of them, the tax fell only upon persons or property passing through, into or out of the State. But we contend that this was not made the ground of the decision in any of the cases, and in the nature of the case it could not be. If the State of Nevada had not the right under the Constitution of the United States, to impose a tax upon passengers traveling out of that State to other parts of the Union, surely she

could not obtain it by at the same time imposing a like tax upon those traveling from one point to another within the State.

The law of the State of Delaware, upon which the case of *Minot* vs. *The Railroad Company*, already quoted, arose, made no discrimination in this respect, and in answer to the argument, based on this fact, Mr. Justice Strong said: "It is not the less a commercial regulation, because it does not discriminate between transportation exclusively domestic, and that which extends into other States. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction cannot be changed by adding to it similar conditions for allowing transportation wholly within the State. I need hardly add that a tax upon the ordinary and lawful means of transportation is practically a tax upon the thing transported."

So in the case of *Clarke* vs. *The Railroad Company*, in the Court of Errors and Appeals of the same State, cited above, there was no discrimination, and Chancellor Bates said: "It may as well be observed at this point, that no argument in support of the act can be drawn from the fact that it operates as well upon our own citizens traveling wholly within the State, as upon the citizens of other States passing into or through its territory."

"If the Legislature have not the constitutional power to tax a particular class of passengers, plainly that power cannot be derived by including under the tax laws another class of passengers who may, constitutionally, be taxed. Legislative acts to the validity of which the question of discrimination becomes material, are those which deal with a subject matter fully within the constitutional power of a State, but deal with it in a mode affecting unequally its own citizens and the citizens of other States, contrary to that clause of the Federal Constitution which secures to the citizens of each State, 'all the privileges and immunities of citizens the several States;' (Art. 4, Sec. 2); as if citizens of other States should be placed upon an unequal footing with our own citizens, under laws for the administration of public justice, or touching the decent of real estate, or the distribution of the personal estate of intestates; or as if in the taxing of lands situated within the State, non-resident real estate owners were taxed more heavily than our own citizens hold-

ing lands. But in the present case, the Supreme Court"—of the United States—"having decided that inter-state travel is beyond the taxing power of the State, the only question is whether this act undertakes to tax the forbidden subject matter, and it is quite immaterial whether the act also operates upon travel within the State, a subject matter under State control."

We may here venture to affirm, that not one of the cases decided adversely to the right of the States to tax inter-state commerce, has been put upon the fact of discrimination; as an examination of the cases, notwithstanding what is said in the argument of the learned counsel, and the opinion of the Supreme Court of the State, will clearly show.

And, indeed, under the principle as to the relative powers of Congress and the State Legislatures, laid down in *Cooley* vs. *Board of Wardens*, and since recognized and established in *Gilman* vs. *Philadelphia* and *Crandall* vs. *Nevada*, if legislation affecting inter-state commerce operates upon that class of subjects "which are in their nature national, or admit of one uniform system or plan of regulation," it is exclusively within the power of Congress, and therefore State legislation affecting it *must* be unconstitutional, no matter what other lawful subjects are embraced within the operation of the same law.

Now we think we have already shown that, in the very nature of the case, the subjects affected by this legislation are national; and we also think we can further show that this law, from its very nature, does discriminate against inter-state commerce, as compared with that wholly within a State. That is to say, such would necessarily be the case in the very nature of things if the law existed in two or more contiguous States; and if it may constitutionally exist in one it may exist in all. The effect of a decision in favor of its validity would be to make it possible in all, and hence, as we have already seen, we can only judge of its effect, and of the effect of such a decision, by viewing it as though already existing in all. The counsel for the State, as we understand them, and the Supreme Court of the State certainly, admit that the existence of such discrimination, as a legitimate consequence of the working of the law, would be fatal to its constitutionality. The court says:

"Then, on what principle is it she cannot levy a tax on these instrumentalities for the privileges granted, because the products carried are destined for points without, or from without to points within the State? It is carriage, not destination, which gives the right of toll, tax or charge. It is not levied on them because the products go out or come in, but because they have the privilege and the benefit of transportation. They are not arrested and forbidden to enter or leave the State till a charge is paid; that would be a duty on imports or exports, and a regulation of inter-state commerce. *They are not discriminated against and required to pay more than others pay, because they go out or come into the State; that would be a regulation and a tax of inter-state commerce;* but they pay as all other products carried within the State pay, a charge for transportation — no more, no less, but the same exact freight paid by all others. The tax in this case is merely a charge upon the corporation for the freight carried over the road, levied equally on all, and rated equitably according to the character of the freight and the expense required to move it. It is clearly nothing but a tax on the business of the road, measured by the number of tons carried over it."

And again: "It is evident it does not matter whence or whither these tons travel, so that there is no discrimination to forbid or to burden their entrance into or exit from the State, and being a tax on the benefit and the privilege of transportation on works constructed for this end, it bears equally on all."

And again: "If she does not discriminate between that which goes out or comes in and that which remains within, it cannot be said that she in any sense attempts to regulate commerce with other States, or to impose a duty on imports or exports. In principle, where there is no discrimination, there is no difference between a tax on a transporter, whether in gross or measured by the tons he carries, and a tax on the farmer, the manufacturer, the miner, the merchant or the broker, measured by the business he does."

The whole stress of the argument is put upon the assumed fact that the law in question does not, either in its terms or its practical working, discriminate between intra-state and inter-state commerce, and it is admitted that if it did, it "would be a regulation and a tax of inter-state commerce."

And the learned counsel adopt this language as part of their argument, and seem to regard the reasoning as conclusive.

In support of the position thus assumed, and taking for granted that where there is no discrimination in express terms against inter-state commerce in a State tax law, there can be none in its practical operation and it must be upheld by the court, the cases of *Woodruff* vs. *Parham*, 8 Wallace, 123, and *Hinson* vs. *Lott*, id. 184, are cited. We think we can show that a decision cannot be rendered sustaining the constitutionality of this tax law, without sanctioning discrimination against inter-state commerce, and that the State legislation validated by such a decision must, from its very nature, operate to produce this discrimination, and therefore we contend that, according to the principle laid down in these cases and the later case of *Ward* vs. *Maryland*, 12 Wallace 418, the law in question in this case must be declared unconstitutional. Let us examine these three cases and see what is the principle to be deduced from them.

In the first case, the City of Mobile, Alabama, under a provision in its charter, levied a tax on all sales at auction within the city. It was shown that the sales made by the plaintiff, Woodruff, included large amounts of goods and merchandise, the product of States other than Alabama, which were brought into the State and sold in the unbroken packages. This court held the taxing act constitutional, on the ground that it was "a simple tax on sales of merchandise, imposed alike on all sales made in Mobile, whether the sales be made by a citizen of Alabama, or of another State, and whether the goods sold are the produce of that State or some other." But if the effect of the law had been to impose heavier burdens upon merchandise produced in, or brought from, other States, or if the principle of the decision would have necessarily sactioned the passage of laws which would have that effect, the law would have been held unconstitutional; for the court, referring to the observations contained in the opinion in *Brown* vs. *Maryland*, that "we suppose the principles laid down in this case, to apply equally to importations from a sister State," say: "If the court then meant to say, that a tax levied on goods from a sister State, which was not levied on goods of a similar

character produced within a State, would be in conflict with the clause of the constitution giving Congress the right 'to regulate commerce among the States,' as much as the tax on foreign goods, then under consideration, was in conflict with the authority 'to regulate commerce with foreign nations,' we agree to the proposition."

And in *Hinson* vs. *Lott*, which arose under a statute of Alabama, which, in effect, imposed a tax of fifty cents on each gallon of whiskey sold within the State, whether of domestic manufacture, or brought from other States and sold in the original packages, the court say:—"As the tax does not discriminate against citizens of other States, but merely charges all alike, it is not an attempt to regulate commerce, but is an exercise of the taxing power of the State."

These cases clearly show that the court would not sanction any State tax law which, in its terms or its working, would result in the imposition of heavier burdens upon the citizens or products of other States than upon those of the State enacting the law, but would hold all such repugnant to the Constitution of the United States; nor render any decision, the effect of which would be to sanction a system of State tax legislation which would result in discrimination in favor of some as against other of the States, or impose heavier burdens upon inter-state commerce than upon commerce carried on wholly within a single State.

Tried by this test, we think the law in question in this case must fall; for we conceive that a very brief examination of its nature, and of the effect of a decision upholding it, will show that if it be sustained there is absolutely nothing to prevent a system of taxation of commerce being adopted by the several States, which must necessarily result in most oppressive, unequal and injuriously discriminating taxation.

If the State of Pennsylvania can pass and enforce a law such as this, every other State in the Union can do the same. The effect, therefore, of a decision of this court sustaining this law would necessarily be, to authorize every State to enrol on its statute book a similar enactment, and the existence of it in one State will be an inducement for each other State so to do. We must therefore

look at the question now before the court as we would look at it if every State *had* enacted such a law, and the court were to decide whether such a *system* of legislation could be sustained. Now, it is perfectly obvious that with such a system of laws in operation, taxation would be unequal and discriminating. Articles of commerce transported from one point to another, both within the same State, would pay but one tax. Those transported from one State into another would pay two taxes, one in each State. Those which passed over any part of the territory of three or more States, would pay taxes limited in number only by the number of States, and in amount only by the wants or the will of the several States. This would be a direct discrimination against commerce among the States, for from the very nature of the case only the internal domestic commerce of each State would be free from burdens imposed by any other State, and would be liable to but one tax; all inter-state commerce would be subject to the burden of taxation imposed by at least two States; and the more extended and diffused, the more a matter of interest and profit to the nation at large, the more national and less local, in short, such commerce would become, the greater in number and amount would be the burdens and exactions imposed upon it.

Thus the citizens of those States which are obliged to transport the articles of commerce in which they traffic from a greater distance, or through a greater number of intervening States, would find their commercial transactions encumbered with heavier burdens, and subject to different and more onerous regulations, than would those of the States which deal mainly in articles produced and procured nearer home. The western merchant would pay taxes on merchandise purchased in New York, determined in number and amount by the number of State lines across which it was necessary for him to transport it. So, too, the flour and grain of the west, on its way to market, would be subject to varying burdens, determined by the same conditions. Here would be discrimination, inherent in the very nature and principle of this law, when we consider that a decision in favor of its validity involves, as a necessary inference, a declaration that a similar law may, at the same time, exist in every State in the Union. Thus commerce would be regulated, and regulated, too, in such a way, that the burdens

imposed upon it would be unequal, and in many cases ruinous.

Such legislation would impose unequal burdens in another respect. It would discriminate in favor of some commercial highways, as against others. Thus the products of Calafornia, and the other Pacific States, would pay one amount of tax if brought to New York overland, through the intervening States, another, if brought by sea. And it is easy to see that such a system of taxation, as would be declared constitutional by a decision in favor of the constitutionality of this law, would amount to a prohibition of commercial transportation over the great trans-continental railways now built and building.

So the products of the north-western States, brought east by railway, would pay a different tax from those transported between the same points by way of the great lakes; and the same would be the case as to merchandise carried west. And articles of commerce, transported between the east and west, would pay more if sent by some of the great trunk lines, than if sent by others, depending upon the greater or less number of States through which these ran respectively. Merchandise going west, or produce coming east, if sent by the Erie railway, would pay tribute to Pennsylvania; if sent by the New York Central, it would escape this exaction. And thus, certainly, the spirit, if not the letter, of those clauses of the Constitution which provide that "all duties, imposts and excises shall be uniform;" and that "no preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another, nor shall vessels bound to or from one State be compelled to clear, enter or pay duties in another," would be violated. It is true, these clauses limit the power not of the States but of Congress; but as they forbid the exercise of the power in certain ways to that body which alone possesses it, we must infer an intention not to permit it to be so exercised by any one.

In the PASSENGER CASES, 7 Howard 283, Mr. Justice M'Lean says, p. 407—"If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State in the Union. And New York State does, in fact, lay a tax on passengers on board of any coasting vessel which arrives

at the port of New York, with an exception of passengers from New Jersey, Connecticut and Rhode Island, who are required to pay for one trip in each month. All other passengers pay the tax every trip."

"If this may be done in New York, every other State may do the same, on all the lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or any other of our rivers, or on the lakes, may be required to pay a tax, imposed at the discretion of each State within which the boat shall touch. *And the same principle will sustain a right, in every State, to tax all persons who shall pass through its territory in railroad cars, canal boats, stages, or in any other manner.* This would enable a State to establish and enforce a non-intercourse with every other State."

"The ninth section of the first article of the Constitution declares: 'Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.' But if the commercial power of the Union over foreign commerce does not exempt passengers brought into the country from State taxation, they can claim no exemption under the exercise of the same power among the States."

And Mr. Justice Grier, in the same cases, delivering his opinion, p. 461, says: "Moreover, if persons migrating to the Western States may be compelled to contribute to the revenue of Massachusetts, or New York, or Louisiana, whether for the support of paupers or penitentiaries, they may with equal justice be subjected to the same exactions in every other city or State through which they are compelled to pass; and thus the unfortunate immigrant, before he arrives at his destined home, be made a pauper by oppressive duties on his transit. Besides, if a State may exercise this right of taxation or exclusion on a foreigner, on the pretext that he may become a pauper, the same doctrine will apply to the citizens of this Union; and thus the citizens of the interior States, who have no ports on the ocean, may be made tributary to those who hold the gates of entrance and exit to commerce." And again, p. 464, "Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free, and it is therefore not

left to the discretion of each State in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it."

These doctrines, we conceive, apply as well to a case where the tax is imposed on freight as where it is imposed on passengers, and recognize the principle that discrimination can no more be upheld, when it, in the very nature of the case, arises out of the practical working of the law, or its existence is permitted by necessary inference from a decision of this court, than when it is expressed by the law itself.

It is no answer to this position to say, that while the working and practical effect of such a system of tax laws, might be such as we have described—which indeed cannot be denied—yet so long as no one State imposed a greater burden upon inter-State commerce, than upon her own internal commerce, there would be no intent to discriminate. The fact might be so, but the question to be decided by this court is not one of intent. The court will look at the practical working of the law, and the practical bearing of the decision it may pronounce upon it.

And herein lies the distinction between this tax law, and those in question in *Woodruff* vs. *Parham*, and *Hinson* vs. *Lott*. Those acts did not discriminate in terms, and from the nature of their subject matter, if there was no discrimination in terms, there would be none in their practical operation and effect. If a like law had been in operation in every other State in the Union, no article sold, no matter where produced, or whence it came, whether from within or from beyond the borders of the State where sold, would have been taxed twice. No two of these laws could operate upon the same subject matter. The tax was conditioned by the sale, and this being made, the transaction was ended. Hence, so far as the matter of discrimination and non-discrimination was concerned, these tax laws were unobjectionable. At the same time, the opinion in *Hinson* vs. *Lott*, shows that the court will carefully scrutinize the whole scope and effect of the statute under review, and will not determine from the mere language of the act, whether it does or does not discriminate.

And the court say in this case that a discriminating tax belongs to that class of legislation which is forbidden to the States, whether Congress has legislated on the subject or not. Hence, when a case occurred where, in the tax law in question, a discrimination was made against the citizens and products of States, other than the one enacting the law, this court did not hesitate to pronounce such law unconstitutional. This was the recent case of *Ward* vs. *Maryland*, 12 Wallace, 418. In this case the law of Maryland required all traders in goods, chattels, wares and merchandise, whether permanent residents in the State or not, to obtain and pay for a license to trade, but, as was inferred from a comparison of the acts and the mode of their operation, required these not permanent residents of the State to pay a larger sum for such license than was required from residents. This court says: "Taxes, it is conceded in these cases,"—*Woodruff* vs. *Parham*, and *Hinson* vs. *Lott*,—"may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of other States of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer, or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities." * * * *

"Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the power conferred upon Congress to regulate inter-state commerce is of no value, as the unrestricted power of the States to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States. Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it

should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system."

"Evidence to show that the framers of the Constitution intended to remove those great evils in the government is found in every one of the sections of the Constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a State shall not be obliged to enter, clear or pay duties in another."

"Important as these provisions have been supposed to be, still it is clear that they would be comparatively valueless, if it should be held that each State possesses the power in levying taxes for the support of its own government, to discriminate against the citizens of every other State of the Union.

"Much consideration was given to these clauses of the Constitution in the *Passenger Cases*, and they were there regarded as limitations upon the power of Congress to regulate commerce, and as intended to secure entire commercial equality, and also as prohibitions upon the States to destroy such equality by any legislation prescribing any conditions upon which vessels bound from one State to another shall be permitted to enter the ports of another State. Congress, said Mr. Justice Grier, has regulated commerce by willing that it shall be free, and it is therefore not left to the discretion of each State either to refuse a right of passage through

her territory or to exact a duty for permission to exercise such a privilege."

"Viewed in any light, the court is of the opinion that the statute in question imposes a discriminating tax upon all persons trading in the manner described, in the district mentioned in the indictment, who are not permanent residents in the State, and that the statute is repugnant to the Federal Constitution and invalid for that reason."

We think that the principle deducible from these three cases, must necessarily lead to a decision against the constitutionality of the act in question here; since the necessary inevitable result of the enactment of a system of laws, such as would be sanctioned and invited by an opposite decision, would be to discriminate in the most onerous and oppressive manner against inter-state commerce.

But, even were this not so, we contend:

THIRD, *That the law in question conflicts with the measures which Congress has adopted in the exercise of its power to regulate commerce among the several States, and that it is, therefore, unconstitutional and void.*

The argument on behalf of the defendant in error is based upon the assumption that Congress has not made any regulations upon this subject with which the State law can come into conflict. This we do not understand to be the case. We think the act of Congress of June 15, 1866, is such an exercise of the supreme legislative authority of the Nation upon the subject of inter-state commerce, as removes it entirely beyond the interference of the State Legislatures. As the act is brief, we insert it here in full. It is entitled "*An Act to facilitate commercial, postal and military communication among the several States,*" and is as follows:

"WHEREAS, The Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and sup port armies; therefore,

"*Be it enacted, &c.*, That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government sup-

plies, mails, freight and property, on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided,* That this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said railroad or connection may be proposed."

"SEC. 2. That Congress may at any time alter, amend or repeal this act."—Statutes at Large, 1865–6, p. 66.

That this act is, in intention and effect, a regulation of commerce among the several States cannot, we think, be disputed. This is shown in the title, in the preamble, and in the body of the act. It is intended to facilitate commercial communication among the several States, and it is expressly put upon the constitutional power of Congress to regulate commerce among the several States. And this is done by authorizing every railroad company in the Union operated by steam, to carry passengers, freight, property, &c, on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines. Nor can it, we submit, be doubted that the tax law in question in this case, considered as one of a series extending throughout all the States, which a decision in favor of this one would sanction, conflicts with this regulation The right of every railroad company to carry freight, for compensation, on its way from any State to another State, over its road, implies the right of the owners of such freight to have it thus carried, on the payment of such compensation as the company is willing to receive. And the exercise of these rights as thus given cannot lawfully be made subject, by the State Legislatures, to the additional burden of the payment, in each State into or through which such freight may pass, of such additional sum by way of tax, as each State may choose to exact.

We think the case of *Gibbons* vs. *Ogden*, 9 Wheaton, 1, is a direct authority for this position. The State law granting the exclusive right to navigate the waters of New York was there held unconstitutional and void, as against vessels licensed to carry on the coasting trade under the provisions of an act of Congress. Marshall, C. J., after examining the provisions of the act, and showing that they amount to the grant of a license to such ships or vessels as comply with their requirements, to carry on the coasting trade, says: "The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do whatever is within the terms of the license." * * * * *

"The license must be understood to be what it purports to be, a legislative authority to the steamboat Bellona, to be employed in carrying on the coasting trade, for one year from its date."

The only point which Chief Justice Marshall seems to consider it necessary to establish is that the authority granted is as ample when contained in a license, obtained in pursuance of an act of Congress, as it would have been if contained in the act itself. Here the authority is contained in the act, and, understanding it to be what it purports to be, it is a legislative authority to the railroad company, plaintiff in error, and other like companies, "to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination."

This is the authority granted; it is granted by one who has power to grant it. If, then as Marshall, C. J., says, "it transfers all the right which the grantor can transfer, to do what is within the terms of the license," the grantor here having supreme authority over the subject matter of the grant, it must necessarily follow that no subordinate power can attach any conditions or burdens to the exercise of the right. This position is not, as we

think, affected by the fact that the railroad companies pay nothing to the United States for the authority granted by the act. The right of the importer to sell foreign goods without paying a State license is as perfect as to goods upon which no duty is paid, as it is in respect to those upon which duty is charged.

We consider the principles established in *Brown* vs. *Maryland*, 12 Wheaton, 419, according to which the importer, having authority from the United States, by a compliance with all the regulations on the subject established by Congress, to import goods, could not be taxed for the exercise of the right to sell, to be applicable here, although nothing was said in the acts of Congress in regard to sale. It was considered that Congress, having legislated on the general subject, must be held to have made all the regulations which it was intended should be attached to the full exercise of the authority granted.

We think, also, that *The Passenger Cases* are authority for the same proposition. So, too, *Pennsylvania* vs. *The Wheeling Bridge Company*, 13 Howard, 518. This case, as has been said, "reaffirms, in the most emphatic manner, the doctrines of *Gibbons* vs. *Ogden*, and directly and pointedly holds that the national legislation need only embrace, in a very general and incidental manner, the subject matter covered by the State law. Here Congress had never uttered a word or promulgated a rule respecting bridges; it had only recognized the Ohio as a navigable stream, upon which commerce is carried on. Yet this recognition was deemed a sufficient act under the power to regulate commerce, and thereby the State authority to erect a bridge which should interfere with that commerce was destroyed."—*Pomeroy's Const. Law*, Sec. 366. And if this was the case in respect to a bridge, a subject as we have seen, more especially left within the power of the States, much more would the doctrine apply to the greatly more extended and national subject of railroads. We may here add that the very fact that Congress has, in the avowed exercise of its power to regulate commerce among the several States, legislated in the manner shown above, seems to prove that the transportation of freight and passengers from State to State is considered to be one of those subjects which are "in their nature national," and which

"admit of one uniform system or plan of regulation." And this would seem to have been the view held by Mr. Justice Miller, who, delivering the opinion in the Circuit court, in *Gray* vs. *The Clinton Bridge*, 7 Am. L. Reg., (N. S.,) 149, says: "It seems to me that when these roads become parts of great highways of our Union, transporting a commerce which embraces many States, and destined, as some of these roads are, to become the channels through which the nations of Europe and Asia shall interchange their commodities, there can be no reason to doubt that *to regulate them is to regulate commerce, both with foreign nations and among the States;* and that to refuse to do this is a refusal to discharge one of the most important duties of the Federal government. As already intimated, the shackles with which the several States fettered commerce, in their selfish efforts to benefit themselves at the expense of their confederates, was one of the main causes which led to the formation of our present Constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the Federal government, has justified the wisdom of our fathers. But are we to remit the most valuable part of that commerce again to the control of the States, and to all the consequent vexations and burdens which the States, through whose territories it must be carried on, may impose? And must all this be permitted because the carrying is done by a method not thought of when the Constitution was framed?"

But we must not overlook the argument and ground upon which the Supreme Court of the State have based their decision in favor of the constitutionality of this tax law. It certainly has the merit of novelty, and if it be sound, then all who have heretofore discussed this question have been wide of the mark.

The ground of the decision is thus stated by Agnew, J., delivering the opinion of the court, (Reed, J., dissenting):

"Among the most important reserved State rights, and one directly connected with the question before us, is that of eminent domain. * * * * *

"Under this invaluable power the States have built up a net work of railways and canals, and have improved natural channels, through which the commerce of the whole Union is coursing, like the life blood throughout the natural system. This was not

done under any supposed authority to regulate inter-state commerce, or to aid in the execution of the federal power over commerce between the States; but was done under the unquestioned power of the State to improve her own resources, and to regulate her internal affairs. Yet does any one doubt the grand and beneficial impulse given to inter-state commerce by this exercise of State power? And who can doubt that the State has a right to compensation for this expenditure of her means, and the benefit she has conferred on all who use her works? They were built by herself, under her franchises, and the right to exact tolls, charges and fares for their use, is a necessary consequence of her power to construct them. Nor does it make any difference what form her compensation takes—whether that of a direct charge on the tonnage using the road, or that of a tax on the corporations who use her franchises—her right is to exact the compensation from those who use the works. To gainsay this is to deny her right of eminent domain, and her power to legislate upon her internal affairs, and the creations of her own sovereignty."

"If these works were, as once some of them were, in her own hands, what provision in the Federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to the pre-existing tolls and charges? To legislate once, is not to exhaust her power over the subject of tolls or charges, but to legislate at all is to assert her power. Whether it be called a toll or tax, what is this but to increase a charge which she can rightfully demand? The right to demand any toll or charge upon all articles transported, or fares for passage, is derived from her grant, and the power to determine their extent depends on her discretion. It is a right of which she cannot be deprived, and of which she is the only judge, unless, perhaps, the power should be so unreasonably and oppressively exercised as to afford evidence of a design, by a fraudulent use of the power, to interdict or ruinously affect the commerce of the other States. To say, because her citizens engage in mining for an extra territorial market, or because merchandise may pass over these works out of or into the State, that to exact tolls and charges for the minerals or merchandise trans-

ported over them, or to tax the franchises of those engaged in the work, is a regulation of commerce, is to confound all just distinctions and to destroy the most sacred right of a State. Her power to levy revenue from transportation over these works may be seen in her power over the works themselves. If compensation were denied her by way of revenue, who can dispute her power to suffer her own works to fall into decay and ruin; or, when unfettered by a charter contract, to repeal the charters under which they were built. Inter-state commerce might suffer, but what power could forbid the act?"

And, summing up in conclusion: "The case is not rested on the debatable ground of State power to regulate inter-State commerce in the absence of Congressional legislation on the same subject, but on the admitted right of a State to execute its power of eminent domain in the construction of works for the transportation of freight and passengers, and to legislate and tax their use by those who choose to employ them, as undoubted subjects of her domestic affairs and of that internal commerce which she can rightfully control so long as she does not fraudulently exercise her power to the injury of the citizens of other States."

The position here taken, as we understand it, is, that the State derives her right to tax these railroads, from the fact that they obtained their right of way by the aid of her power of eminent domain; and that this tax which falls upon the articles of commerce transported, or their owners, because she has authorized it to be added to the existing tolls and charges, is compensation for the use of these works so constructed, or in other words, a toll for the use of the works.

An obvious remark here is, that if this is a "tax or toll added to the pre-existing tolls and charges," it cannot be a tax upon the franchises of the corporation, since it does not pay, but instead receives, these "tolls and charges." We have, however, already seen, by an examination of the provisions of this statute, and the authorities bearing upon this point, that it is not a tax upon the franchises of the corporation, but upon the articles of commerce transported.

Now no one doubts the right and power of the State to tax the franchises of these corporations, and it is assuredly not necessary to invoke the aid of one undoubted power, to sanction the exercise of another. Indeed, so far as the exercise of the power of eminent domain has any influence on the power of taxation, it is to exempt from it, not to render liable to it. This is clearly seen by the numerous decisions rendered by the Supreme Court of Pennsylvania, which establish the doctrine, that the line of a railroad, and the ground occupied thereby, and the buildings necessary for the enjoyments of the franchises of the corporation, are exempt from taxation; and the ground of the doctrine is, that these are public works, which were taken for public use, under the Commonwealth's right of eminent domain.—See *Lackawana Iron Company* vs. *Luzerne County*, 40 Pa. St. R. (6 Wright) 424, where the cases are collected; and *Railroad* vs. *M'Lanahen*, 59 Pa. St. R. (9 P. F. Smith) 29, where it is said that "this principle may now be considered as firmly established;" and it extends to taxation for State as well as for county purposes.—*Commissioners* vs. *Delaware and Hudson Canal Company*, 15 Pa. St. R. (3 Harris) 351.

The same principle is laid down, and for the same reason, in Massachusetts; *City of Worcester* vs. *Western Railroad Company*, 4 Metc., 546, where Shaw, C. J., says: "Treating the railroad then as a public easement, the works erected by the corporation as public works, intended for public use, we consider it is well established that, to some extent at least, the works, necessarily incident to such public easement, are public works, and as such exempt from taxation." * * * "The only principle on which the Legislature could have authorized the taking of private property for its construction, without the owners' consent, is that it was for a public use."

It is true this principle only extends to the exemption from taxation of the line of the road, and the buildings erected thereon with the appurtenances; but it is equally true, that it is only as to these that the power of eminent domain has been granted by the State, and exercised on behalf of the corporation. So far then as the exercise of this power affects the question, its effect is directly the opposite of that ascribed to it by the State court, as is further shown by the fact that the real estate of

other corporations, created by the State, to whom, however, the exercise of the right of eminent domain is not granted, is taxable the same as if owned by individuals.—40 Pa. St. R., *ut supra*. And the franchises of corporations, to whom the exercise of the right of eminent domain is not granted, are as taxable as are the franchises of those to whom it is.

We contend further that there is nothing in the argument that, as the State, if she owned these roads, might, if she chose, suffer them to fall into decay, and, when "unfettered by a charter contract," might "repeal the charters under which they were built;" she may, therefore, levy this tax as "compensation by way of revenue" upon inter-State commerce transported over them. To say nothing of the fact that where she has authorized such connections to be made with roads in other States as to establish inter-State lines of travel, she would probably be found without power to obstruct or destroy them, we think the premises assumed do not support the conclusion. It is equivalent to saying that because the State has created these corporations, she may through them tax, indirectly, subjects which she is forbidden to tax by the Constitution of the United States.

This argument was much pressed by counsel in support of the tax in question in *Bank Tax case*, 2 Wallace 200, as appears from pp. 201–2 of the Report; but it evidently met with no favor from the court. And it is evident that the State cannot, by creating instruments for the purpose, tax that which it would otherwise be unconstitutional for her to tax.

The further argument that this tax is merely a toll paid for the transportation of freight over the road, is, we think, equally incapable of being maintained. The State has no title to any part of the toll charged or earned upon the roads, since she has no ownership in them, nor does she furnish the transportation or render the service for which tolls and freights are charged. These are owned and provided by the corporation, to whom alone the tolls and charges belong.

Besides, there is a radical difference between a tax and a toll. A tax can be levied only for a public purpose; a toll may be and usually is a private charge. A tax is levied upon the ground of

necessity, for the support of the government, and the only compensation required to be made in return for it is the general protection afforded by the government to its citizens; and there is no necessary relation between the value of this protection and the amount of tax levied. Indeed, a bad government is likely to demand more taxes than a good one. A toll is charged as an equivalent for some special advantage or privilege granted to the party who pays. To argue that because the State, if she owned these works, as she once did some of them, could make such charge for "transportation over them" as from time to time she deemed expedient and most productive of revenue, *therefore* she can *tax* inter-State commerce passing over them, when owned by her corporations, is, we think, to use the language of the learned judge, "to confound all just distinctions," and to draw conclusions not warranted by the premises assumed. Besides, if the argument be worth anything, it proves that the State has the same right, in its nature and its extent, "to levy revenue from transportation over these works," as she had before she sold them, and hence that the only thing she parted with by the sale, in return for which she received millions of dollars, was the burden of keeping the works in repair and furnishing the facilities for transportation. The truth is, there is no analogy between the right to tax and the right to charge toll, or compensation for transportation. The State cannot *tax* the United States, yet if she owned these works she could charge the United States the same *toll* for the use of them that she could charge any one of her private citizens for the same service. These corporations cannot *tax* the United States, yet they too have the same right to charge the United States with *toll* as they have to charge any individual. And, so far is it from being the case that the State has the right to charge anything in the nature of *toll* from those who use these works, these corporations have the same right to charge the State herself with *toll* as any one else, if she use the works.

Another consideration, which both illustrates the difference between a toll and a tax, and shows that the former is an element of commerce, and is regulated by the nature and extent of the commerce concerned, while the latter amounts to a regulation of commerce, is this: That the amount of the tolls and charges is

determined by the amount and nature of the services rendered and the commercial facilities afforded, and is governed by the laws of trade, and of demand and supply, and is also a matter of contract between the shipper and the carrier, while taxes need not, and in this case do not, bear any relation or proportion to any of these things. No additional service is rendered because of them, they are not contracted for but are compulsory, the laws of demand and supply have nothing to do with them, nor have any other of the matters which form the consideration for the payment of tolls and freight by the shipper to the carrier or transporter.

Again, a State in levying a tax acts in the capacity of a sovereign, and exercises one of the fundamental rights of sovereignty. In taking tolls, where she is entitled to them, she acts in the capacity of an owner of the works or improvements for the use of which the toll is charged, and not in any proper sense as a sovereign. This is declared and illustrated in *State of Pennsylvania* vs. *The Wheeling Bridge Compang*, 13 Howard, 518. The State of Pennsylvania filed a bill in chancery in this court, averring that she owned valuable public works, canals and railways, constructed at great expense as channels of commerce, for the transportation of passengers and goods, from which a large revenue as tolls was received by her, and that the Wheeling bridge would so obstruct the navigation of the Ohio river, with which her works connected, as to cut off trade and business from these works, and thus impair and diminish her tolls and revenues; and prayed an injunction against the erection of the bridge. In delivering the opinion of the court, Mr. Justice M'Lean, discussing the question of jurisdiction, and the standing of the State of Pennsylvania in court, says: "When a State enters into a co-partnership, or becomes a stockholder in a bank or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners. And so in the present case, the rights asserted and the relief prayed are considered as in no respect different from those of an individual. From the dignity of the State, the Constitution gives to it the right to bring an original suit in this court. And this is the only privilege, if the right be estab-

lished, which the State of Pennsylvania can claim in the present case."

And again: "On a question of disputed boundary between two States, although the inquiry of the court is limited to the establishment of a common line, yet the exercise of sovereign power over more or less territory may depend on the decision. This gives great dignity and importance to such a controversy, and renders necessary a broader view than on a question as to the mere right of property. But in the present case the State of Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property, on the same ground and to the same extent as a corporation or an individual may ask it."

So far as the tax law in question in this case can be regarded in the light of a tax imposed on the plaintiff in error, we contend:

FOURTH, *That the State of Pennsylvania after having contracted with said company to grant it the franchise of a right of way through her territory in consideration of the payment of an annual tax of ten thousand dollars, and a stipulated tax upon the stock, cannot subject it, in addition, to the taxes imposed by general laws on other companies, without impairing the obligation of such contract.*

It is to be noted that this is not the ordinary case of the granting and accepting of a charter with a clause fixing the present rate of taxation, with the implied right on the part of the State to change this at any time. This company is not a Pennsylvania corporation. It is expressly recognized in the Pennsylvania legislation respecting it to be a corporation of the State of New York; and the act granting it the right of way recites that "Whereas, It is alike politic and just that amity between adjoining States, in respect to their internal improvement operations, should be respected and maintained, therefore," such right of way is granted; and we may remark that in this first act, passed in 1841, no payment in return was stipulated for. It was not until 1846, when a supplement was passed, that there was added to the "amity between adjoining States" as a consideration, the payment of the tax of ten thousand dollars annually, and a tax on

an amount of the stock of said company equal to the cost of the construction of that part of the company's road situated in Pennsylvania.

And who can for one moment doubt that this was understood both by the corporation and the State to be all the tax that, in the event of their becoming parties to the contract, could be exacted. And such was the understanding of the Supreme Court of Pennsylvania, when the question was first presented to them. In *New York and Erie Railroad Company* vs. Sabin, 26 Pa. St. R., (2 Casey,) 244, Woodward, J., delivering the opinion of the court says: "We are of the opinion that the annual tax of ten thousand dollars imposed upon the company by the fifth section of the act of March 27, 1846, was intended to compensate the Commonwealth for the right of way through her territory, and that the tax imposed by the sixth section of said act upon that portion of the company's stock, which represents the cost of construction in Pennsylvania, was meant to be *in lieu of all other taxation* of the property of the company within our borders."

We do not mean to contend that the mere stipulation for, and payment of, a bonus for a charter, would, without more, imply a waiver or relinquishment of the right of further taxation. But we do not look upon this as such a case. The thing stipulated for here is not a bonus, but an annual tax of $10,000, in addition to a tax upon the capital stock. Instead of leaving the amount of the tax upon this corporation to be determined by the general tax laws of the State, it was no doubt deemed best for both parties to the contract to fix the amount of tax to be paid annually at a specific sum. We might admit even, that the State still retained the right to change the mode of taxation, and to substitute the taxes imposed under general laws, for this specific tax, at least so long as it did not increase the aggregate amount; but it is not easy to believe that she retained, or intended to retain, the right, in addition to the specific tax, to subject the company to the same taxes imposed on other companies, or, in other words, that she stipulated for the payment of ten thousand dollars each year more taxes by this company than any other, with the same amount of property and business, would be compelled to pay.

And herein consists the difference between this case and the cases where it has been held that a rate of taxation specified in a charter did not amount to a contract that this rate should not be changed; and we do not think any case can be found where it has been held that when a general rate was afterwards established different from that specified, the whole of the old rate, as well as, in addition thereto, the whole of the new rate, could be exacted; or, in other words, that the later general act added to the existing special rate, all the amount of tax imposed by it, so that both became chargeable in full upon the corporation concerned. It would seem to be required by every principle of justice as well as law, that if the later law changes the former it must, at least *pro tanto*, repeal it.

What is claimed here, however, by the State of Pennsylvania is, not that the act of August 25, 1864, repealed or even altered the provisions of the act of March 26, 1846, imposing the payment of the sum of $10,000 annually, but that the taxes imposed by the act of 1864 are in *addition to* the former amount, leaving this company to pay its proportion of taxes with all other like companies, and in addition the ten thousand dollars annually.

It would seem as though this feature of the case was not adverted to by the Supreme Court of the State. Thus Sharswood, J., delivering the opinion of the court, 66 Pa. St. R., (16 P. F. S.,) 87, says: "It is not pretended that there is any express release of legislative power, but it is contended that, as the company have agreed to pay and the State to accept these sums, it is necessarily implied that no more shall ever be exacted. So it might well be argued if any special taxation were imposed upon this company; for that would be to require an additional price beyond the terms of the contract. But the question whether they shall be subject to a general tax laid upon all railroad and transportation companies in the Commonwealth is an entirely different one."

Now, we do not understand the question to be, as thus stated, simply "whether they shall be subject to a general tax laid upon all railroad companies" in the State, but whether they shall be subject to this over and above, and in addition to being at the same time subject to a special tax, in the same manner and to the same extent as they were before the general law was passed. This we

understand to be the effect of the law by virtue of the decision of the State Court on this point, and as this would subject this company to both a general and a special tax, we think it is manifest that it cannot be sustained.

As we have said above, we think an examination of the cases, cited to prove the constitutionality of this act as thus applied, will show that in none of them was a general taxing law superadded to a special law previously existing in the particular case, so as to render the party liable to both. Thus in *Providence Bank* vs. *Billings*, 4 Peters 516, the act complained of, and sustained by the court, merely subjected the bank to a general tax, nothing whatever having been said in its charter on the subject of taxation. That this could lawfully be done was the only point decided in the case. And in *Bank* vs. *The Commonwealth*, 10 Pa. St. R. (10 Barr) 442, the question was whether the tax should be levied at the special rate mentioned in the charter, or the rate specified in a later general law. The court held the bank subject to the rate specified in the general law, but it was not claimed or pretended that it was subject to both rates. The general law was held to repeal the special act *pro tanto*.

These are the cases cited in the Supreme Court of the State to sustain the proposition that this company is liable to the general tax imposed on all railroad companies in the State, while at the same time it remains liable to the specific tax of ten thousand dollars imposed in the supplement to the act granting it the right to construct part of its road within the State.

In the case of *New York and Erie Railroad Company* vs. *Sabin*, cited above, decided by the Supreme Court of Pennsylvania in 1856, the court say they are of the opinion that the imposition of the ten thousand dollars, and the tax upon the stock of the company in proportion to the cost of the road in Pennsylvania, "was meant to be in lieu of all other taxation of the property of the company" within the State. This was a judicial construction of the contract between the State and the company, made in a case in which the State and the company were virtually the parties litigant, and it might therefore, well be considered a binding adjudication of the question. And it was while this decision stood

on record as the law of the contract, that the present plaintiff in error, the Erie Railroad Company, purchased the road and franchises of the New York and Erie Railroad Company, under authority from the State of Pennsylvania to do so, by virtue of the act of March 22, 1860, (see printed record p. 30,) which provided that the purchaser should become vested with all the railroad and roadbed, estate, real and personal, property, rights, powers, privileges and franchises which the said company"—the New York and Erie Railroad Company—"now possess or hold in the State of Pennsylvania, or did possess at the date of the appointment of the receiver, subject to all the duties, penalties, taxes, restrictions, obligations and provisions of the laws of this State relating to and concerning said company."

We therefore contend, that to give a different construction to the contract now would be to impair the obligation of the contract between the State and the plaintiff in error.

In *State Bank of Ohio* vs. *Knoop*, 16 Howard 376, this court held that the imposition of a specific tax in a charter which stated it to be "in lieu of all taxes to which such company or the stockholders thereof, on account of stock owned therein, would otherwise be subject, was a contract, the obligation of which the State could not impair by increasing the rate of taxation specified. The Supreme Court of Pennsylvania have said that the taxes specified in the act of March 26, 1846, were meant "to be in lieu of all other taxation of the property of the company," within the State; thus bringing it within the principle of the above case.

In *Gordon* vs. *Appeal Tax Court*, 3 Howard, 133, it was held that a stipulation in bank charters that they should pay an annual charge for their franchises, was, when accepted, a contract between them and the State, and that such contract was "a limitation upon the taxing power of the Legislature making it, and upon succeeding Legislatures to impose any further tax upon the franchises;" and that any further tax upon it "would substantially be an addition to the price paid" for the franchise.

The act of March 26, 1846, provides that "any neglect or refusal by said company to pay, as aforesaid, shall work a forfeiture

of the rights and privileges granted by this act;" thus necessarily implying that so long as the company do so pay, they shall enjoy these privileges and rights, and there is no reservation in the act of a right to repeal, alter, or amend it. Now, the privileges and rights granted by the act were in the first place to construct their road through the territory of Pennsylvania as specified, and second, after having so constructed it, to use and operate it for the transportation of passengers, and freight for hire upon and over such road, subject to the provisions and restrictions contained in the grant. Hence, it would seem to follow, that the exaction of the payment of two, or three, or four cents per ton,—and the right to exact this would imply the right to exact as many dollars—as the condition of the exercise of the right previously purchased and paid for at the stipulated price, would be to require an additional price beyond the terms of the contract; and if so, would impair the obligation of the contract.

J. W. SIMONTON,
Counsel for plaintiff in error.

SUPREME COURT OF THE UNITED STATES.

Erie Railway Company,

Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania,

Defendant in Error.

Brief of Defendant in Error.

LEWIS WALN SMITH,
F. CARROLL BREWSTER,
Counsel for Defendant in Error.

Supreme Court of the United States.

ERIE RAILWAY COMPANY

v.

THE COMMONWEALTH OF PENNSYLVANIA.

Brief of Defendant in Error.

The question raised in this case for the consideration of the court, is identical in all its leading features with that raised in the case of the Philadelphia and Reading Railroad Company *v.* The Commonwealth of Pennsylvania, being No. 358, of December Term, 1870. As the defendant in error has filed an extended brief in that cause, it is not deemed necessary to burden the court by a repetition of the contents of that brief here. He would, therefore, respectfully refer the court to the argument as filed in the Reading Railroad case, and ask that it be taken as part of the brief in the cause now before the court.

One point, however, is raised by the plaintiffs in error in this case, which does not arise in the other tonnage tax cases. It is stated, on page 54 of the paper book of the learned counsel for the company:

"FOURTH. That the State of Pennsylvania, after having contracted with said company to grant it the franchise of a right of way through her territory, in consideration of the payment of an annual tax of $10,000, and a stipulated tax upon the stock, cannot subject it, in addition to the taxes

imposed by general laws on other companies, without impairing the obligation of such contract."

We do not propose to detain the court with any extended argument on the point thus raised. It has been heretofore before the Supreme Court of the State of Pennsylvania, and the decision of that court so fully expressed the case, that we embody it *in extenso*. The case is The Erie Railway Company *v.* The Commonwealth, 16 P. F. Smith, 84. Mr. Justice Sharswood, in delivering the opinion of the court, said:

By the act of Assembly of March 26th, 1846, Pamph. L. 179, the said company, then the New York and Erie Railroad Company, were authorized "to extend the line of their said railroad from a point near the village of Port Jervis, in Orange county, State of New York, across the Delaware river, into the county of Pike, and thence up the valley and near the shore of said river, within the said county, a distance not exceeding thirty miles, to a point not exceeding ten miles above the mouth of Lackawaxere river, and there to recross the Delaware river to the easterly side thereof, in the county of Sullivan, State of New York." By the fifth section it was provided: "That after said railroad shall have been completed and in operation to Dunkirk, or shall have connected at the western area with any other improvement extending to Lake Erie; said company shall cause to be paid into the treasury of this State annually, in the month of January, $10,000; and any neglect or refusal by said company to pay as aforesaid, shall work a forfeiture of the right and privileges granted by this act;" and by the sixth section: "That the stock of said company, to an amount equal to the course of construction of that part of their road situate in Pennsylvania, shall be subject to taxation by this commonwealth, in the same manner as other similar property is, or may be subject." These are all the

provisions which are relied on to show a special exemption from taxation. It is not pretended that there is any express release of legislative power; but it is contended that as the company have agreed to pay, and the State to accept these sums, it is necessarily implied, that no more shall ever be exacted. So it might well be argued, if any special taxation was imposed upon this company; for that would be to require an additional price beyond the terms of the contract. But the question, whether they shall be subject to a general tax laid upon all railroad and transportation companies in the commonwealth, is an entirely different one. There is no principle better established, and it requires no longer array of cases to prove it, than that no surrender of the general power of taxation by any legislative act can be implied, it must be express. The Providence Bank *v.* Billings, 4 Peters, 514; Bank *v.* Commonwealth, 10 Barr, 442. In the case last cited, it was decided that a bank chartered under the act of 1824, which prescribed the payment of a certain tax on dividends declared, was subject to a general law, which increased the rate of taxation. "To deduce from premises so insufficient," said Mr. Justice Bell, "a consequence of such magnitude would, indeed, be a gross violation of the wholesome principle that an abandonment of the power of taxation is only to be established by clearly showing this to have been the deliberate purpose of the State. Though a man pays to the commonwealth a price for a grant of land, which certainly implies that he shall not be specially called on to pay more, but it does not imply that his land shall not be subject to a general taxation, so though a corporation has paid a sum of money for the grant of its charter, that implies no surrender of the power to tax it by a general law applicable to all corporations, though certainly it can be compelled to pay no more as the price of its privileges. Every one buys land from the commonwealth subject, in his own apprehension to the

great law of necessity, that he must contribute from it and all his property something to maintain the government. Gordon *v.* Appeal Tax Court, 3 Howard (U. S.) Rep. 146. If this is so, it is not easy to perceive why the purchase of a franchise by a corporation is not taken subject to the like imperious law. To call upon an individual or a corporation especially to pay an additional sum, in consequence of their being grantees of the land or the franchise, would not be taxation; it would be a taking of their property for public use without compensation. Either in the case of the granted line or franchise, it would be, besides a violation of contract. In either view, the individual or the corporation would be constitutionally protected from it.

The case of the New York and Erie Railroad Company *v.* Sabire, 2 Casey, 242, is not as is supposed inconsistent with this view. It was there held that, inasmuch as the State, by the act of 1846, had imposed a special tax upon the stock of the company, to the extent of the costs of construction, within this commonwealth, that necessarily implied an exemption of the work itself from taxes before imposed for State and county purposes; to hold otherwise, would be to subject the same property to double taxation, which it cannot be supposed that the Legislature intended. "If the company," said Mr. Justice Woodward, "should multiply buildings, and accumulate lands no way appurtenant or essential to their railroad, this property would be subject to taxation like any other lands or houses; but for these erections, which are fairly included in the cost of construction of their road, they are liable to no other taxes than those especially imposed." This was really only applying to the works of this foreign corporation, the same just rule has had been settled in the construction of the general tax laws in reference to similar works of domestic corporations. Schuylkill Permanent Bridge

v. Fraley, 13 S. & R. 442; Lehigh Coal and Navigation Company *v.* Northampton County, 8 W. & S. 334; Railroad *v.* Berks County, 6 Barr, 70; Lackawana Iron and Coal Company *v.* County of Luzerne, 6 Wright 424. "It sometimes happened," said Mr. Justice Woodward, in New York and Erie Railroad Company *v.* Sabin, "that a bonus is demanded and received from a bank or other corporation at the granting of its charter, and afterwards all that class of corporations are expressly subjected to another rate of taxation. No exemption of a particular institution is to be implied from the payment of bonus; for that would be to set up financial implications against an express exercise for the taxing power." Nor does Gordon *v.* Appeal Tax Court, 3 Howard (U. S.) Rep. 133, conflict with these principles. It was there held that a charter of a bank is a franchise which is not taxable as such, if a price has been paid for it, which the Legislature accepted; but that the corporate property is separable from the the franchise, and may be taxed unless there is a special agreement to the contrary. The language of a judicial opinion arguendo is always to be understood in reference to the particular question presented for adjudication, which, in that case, was whether a clause in a charter, pledging the faith of the State not to impose any further tax or burthen during its continuance, than was therein imposed, should extend to exempt the stockholders from a tax on their stock. It evidently has no applicability to the question presented for adjudication in this case.

The unanimous opinion of the court in this case seems to completely cover the ground. For many years it has been acquiesced in by the corporation, hundreds of thousands of dollars has been paid into the treasury of the State of Pennsylvania, under the general tax laws of the State. More than thirty years has elapsed since the act to authorize the Erie Road was passed, and

the uniform practice has been for that company to pay the proportion of the general taxes. It is too late now to seize on the general restraining clause of the Constitution of the United States, and seek behind its salutary provisions to shield itself from contributing its just share towards the burdens of a State through which its line of works extend.

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